

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : April 5, 2013

COMPLETE TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV620, ePlus, Incorporated versus Lawson Software, Incorporated. Ms. Jennifer A. Albert, Mr. Michael G. Strapp, Mr. Craig Merritt, and Mr. Paul W. Jacobs, II, represent the plaintiff.

Mr. Daniel Thomasch, Mr. Josh Krevitt, Mr. Richard W. Mark, Mr. Dabney J. Carr, and Mr. Christopher D. Dusseault represent the defendant. Are counsel ready to proceed?

MS. ALBERT: ePlus is ready.

MR. THOMASCH: Ready for the defendant.

THE COURT: Dr. Weaver, I remind you you are under the same oath which you took yesterday or several days ago.

MS. ALBERT: Your Honor, for housekeeping, I have a copy of the notes from Dr. Weaver's notebooks to hand up to Your Honor, and sorry for the disruption yesterday. If I had known that the witness was --

THE COURT: That kind of thing happens in trials all the time. It's one of the things that happens.

MS. ALBERT: Thank you, Your Honor.

THE COURT: There's nothing wrong with it. People make notes to testify from. The rules provide a

1 mechanism to deal with it, and that's one of those things
2 that happens.

3 THE COURT: Even the labels of notebooks are
4 argumentive these days. One side characterizes the label
5 as Dr. Weaver's testimony on infringement, the other is
6 non-infringement. The subtlety of it all. Please.

7

8 **ALFRED WEAVER,**

9 a witness, called at the instance of the plaintiff,
10 having been first duly sworn, testified as follows:

11 CROSS-EXAMINATION

12 BY MR. THOMASCH:

13 Q Good morning, Dr. Weaver.

14 A Good morning, Mr. Thomasch.

15 Q Just by way of very quick initial housekeeping, if you
16 would turn in the notebook, I want to ask you about the
17 notes and annotations that you made that were copied
18 yesterday evening. And just, if you would, turn to tab
19 one in the cross-examination booklet.

20 A Yes.

21 Q That's two pages. The first one starts with your
22 notes on indirect infringement; is that correct?

23 A That's correct.

24 Q And the second relates to your annotations of the
25 claim chart; is that correct?

1 A That's correct.

2 Q And can you just tell me, when did you prepare these
3 notes?

4 A These were -- I started on these last Friday.

5 Q And you used these throughout the course of your
6 testimony?

7 A I used them yesterday.

8 Q If we turn to tab two, you'll see that -- let me skip
9 tab two for the moment, because that's sort of what is
10 left. So tab three are the notes that relate to the first
11 demonstration; is that correct?

12 A Yes, it is.

13 Q And on the left-hand side, it says 51 slides. I'll
14 refer to them as slide one, slide two, et cetera?

15 A That's correct.

16 Q And when did you prepare the notes on demo one?

17 A Yesterday afternoon.

18 Q If we turn to tab four, am I correct, sir, that tab
19 four, if you can tell, are the annotations that you made
20 on -- it's the pages that had writing on them of the slide
21 deck on demonstration two?

22 A That's correct.

23 Q And when did you make those notes?

24 A Yesterday afternoon.

25 Q Now we'll turn back, if you would please, to all of

1 the other pages, and if you can just flip through those --

2 THE COURT: What does that mean, all the other
3 pages?

4 MR. THOMASCH: I'm sorry, Your Honor. That was a
5 terrible question.

6 Q If you would flip back to tab two which contains
7 annotations on numerous exhibits and documents that were
8 used in your colorability testimony, do you see those?

9 A I do.

10 Q And when did you make those notes?

11 A Those started in February.

12 Q Okay. And you had those documents with you and made
13 reference to them during your testimony earlier in the
14 trial; correct?

15 A Correct.

16 Q I'd like to talk to you initially about the second
17 demonstration, and the slide deck there, I believe, is
18 PX-1135-A, and there's a separate notebook with the
19 slides. I think it is the second tab, if you can follow
20 along with me there.

21 A PX-35-A --

22 THE COURT: Wait a minute. I'm not quite sure
23 I'm following. It's tab what?

24 MR. THOMASCH: It is not in my notebook, Your
25 Honor. This is the contempt proceeding screen shots that

1 were handed out in yesterday's note --

2 THE COURT: Yesterday's.

3 MR. THOMASCH: Yes. I'm sorry, Your Honor. The
4 notebook on its front should say, Screen Shots from
5 PX-1134 and PX-1135.

6 Q Dr. Weaver, is that in front of you possibly on the
7 front edge?

8 THE COURT: Do you have it, sir?

9 THE WITNESS: I do now.

10 THE COURT: Take your time.

11 Q If you could open up that notebook and turn to the
12 tab, the second tab which is screen captures, PX-1135?

13 A Okay.

14 Q I may toggle back and forth or ask for assistance in
15 doing that, but while you are looking at the book, I will
16 have some questions with you about how this relates to the
17 claim elements, and I'll ask to put up the claim elements
18 on the screen. I'll just give you a moment to take a look
19 at those. Do you recognize those as the elements of
20 method claim 26?

21 A I do, uh-huh.

22 Q So the demonstration that's marked PX-1135-A was a
23 single shopping session in item master; correct?

24 A Correct.

25 Q And when you began your presentation, you indicated

1 that what you were going to show is that the first five
2 elements of the six-element claim can be practiced in RQC
3 with item master alone; is that correct?

4 A That's correct.

5 Q Just doing those five elements was not an
6 infringement. If someone did just those five elements,
7 that would not be an infringement of method claim 26;
8 correct?

9 A Correct.

10 Q What configuration among the accused systems was this
11 meant to represent?

12 THE COURT: "This" meaning what?

13 MR. THOMASCH: "This" meaning the system that you
14 were using for the test.

15 THE COURT: You mean 1135-A?

16 MR. THOMASCH: Yes, 1135-A, thank you.

17 A That's configurations three and five.

18 Q And configurations three and five both contain
19 Punchout; correct?

20 A They do.

21 Q Did Punchout have any involvement in your example?

22 A No, not this example.

23 Q Okay. Did you mention Punchout in regard to your
24 testimony, as you recall it, in regard to this
25 demonstration?

1 A No.

2 Q Did Punchout provide any of the features or the
3 capacity that you relied on to say that in doing your
4 demonstration, you were performing the first five elements
5 or steps of claim 26?

6 A Not for this demonstration.

7 THE COURT: You mean in 1135-A.

8 THE WITNESS: Yes, 1135-A.

9 Q Am I correct that the first step in 1135-A is
10 maintaining at least two product catalogs on a database
11 containing data relating to items associated with the
12 respective sources? Is that the first element as you
13 understand it?

14 A Yes, it is.

15 Q And we can refer to that as the maintaining at least
16 two product catalogs step?

17 A Yes.

18 Q You'd recognize that?

19 A Sure.

20 Q Now, if you would turn in your cross-examination
21 binder to the Weaver initial contempt report, I want to
22 draw your attention to page 65, and actually, why don't
23 we, for context, start at page 64. Are you there, Dr.
24 Weaver?

25 A I am.

1 Q And do you see in the middle of the page heading two,
2 demonstrative -- I'm sorry, demonstration establishing
3 that the RQC configurations continue to satisfy the
4 elements of claim 28 of the '683 patent; do you see that?

5 A I do.

6 Q And the section of your report that relates to Exhibit
7 1135-A and the video that accompanied it begins at
8 paragraph 135 and continues through to page 68, paragraph
9 155; is that correct?

10 A That's correct.

11 Q Now, it ends with paragraph 155; thus, this
12 demonstration confirms that the RQC configurations
13 continue to literally satisfy each and every element of
14 claim 28; do you see that?

15 A I do.

16 Q Okay. This demonstration wasn't intended for claim
17 26, was it?

18 A It was not possible to make a demonstration for every
19 claim under every configuration, so this demonstration is
20 applicable -- is perfectly applicable to claim 28, and
21 it's applicable to the first five elements of claim 26
22 because they are identical.

23 Q Does your expert report disclose any opinion that
24 suggests this demonstration intended, in any way, to
25 support an opinion on claim 26?

1 A I don't think it says that in words, but that's a
2 logical inference.

3 Q So the reader of your report, you think, would
4 understand that this was intended to be a demonstration
5 about part of claim 26 and all of claim 28; is that what
6 you thought?

7 A Yes.

8 Q Now, the last paragraph that I read to you that said,
9 this demonstration confirms that the RQC configurations
10 continue to literally satisfy each and every element of
11 claim 28, why didn't you note that it also satisfies
12 certain limitations of claim 26?

13 A I can't write down everything, so I just didn't write
14 that down. It seemed obvious that since the first five
15 elements were identical, that the reader would intuitively
16 understand that.

17 Q If we substituted the number 26 for 28 in paragraph
18 155, the sentence would be inaccurate; correct?

19 A It would.

20 Q Now, turning within that section of your report back
21 to page 65, paragraph 141, do you see references to the
22 Office Max and Diablo catalogs?

23 A Yes, I do.

24 Q Those are each -- Office Max and Diablo both have
25 catalogs that contain all catalog items sold by that

1 vendor; correct?

2 A I don't know if the Office Max trading partner
3 contains everything sold by Office Max, but it contains
4 whatever it contains.

5 Q Office Max has a catalog that contains Office Max
6 items only, correct, items sold by Office Max?

7 A Correct.

8 Q And Diablo has a catalog that contains only items sold
9 by Diablo; correct?

10 A Correct.

11 Q And item master is a database that includes items from
12 product catalogs; correct?

13 A Yes.

14 Q Item master doesn't capture the whole catalog. It
15 takes items from catalogs and puts them in a database;
16 right?

17 A It takes substantial information from the catalogs of
18 Office Max or Diablo or whoever and puts that into a
19 database including the vendor, the item description,
20 picture, price, unit of measure, all of the things that
21 define an item in a catalog per the Court's Markman
22 hearing.

23 Q Understood. It takes detailed information, but it
24 takes them on an item-by-item basis, not on a
25 catalog-by-catalog basis; correct?

1 A You load catalogs into the item master.

2 Q Is that correct?

3 A Yes.

4 Q And do you know that that's how Lawson customers use
5 item master?

6 A Lawson provides the software to do that.

7 Q Okay. Now let's go to the second step in claim 26,
8 selecting the product catalogs to search; correct?

9 A Correct.

10 Q Now, there's no part of your demonstration that
11 depicts the catalogs in item master; correct?

12 A I used that category search tree.

13 Q I'm just asking you, sir, the first step is
14 maintaining catalogs. You can't take a snapshot that
15 shows the various catalogs; correct?

16 A No.

17 Q Okay. So if you will turn to page two of your
18 demonstration. This is the first -- this is what you'd
19 see when you go into the demonstration laptop or setup
20 that you used; correct?

21 A Correct.

22 Q This isn't a production system; right?

23 A No. It's a demonstration system.

24 Q Have you ever seen a production system?

25 A No.

1 Q So if you looked down under Lawson home, you see
2 items, sort of an index, in white and in blue on the
3 left-hand side of the page; do you see that?

4 A Yes.

5 Q Do you see where it says after the first white block,
6 under that requisition self-service and then Requisition
7 Center?

8 A Yes.

9 Q That was on a demonstration setup; correct?

10 A Correct.

11 Q You understand that's not the way that the system ever
12 looks in a customer's production environment; is that
13 right?

14 MS. ALBERT: Objection; lacks foundation.

15 MR. THOMASCH: Certainly. Let me just establish.

16 Q Do you know how the system looks when it's used by a
17 customer not in a demonstration?

18 A I know from the documents that RSS and RQC can run on
19 the same machine.

20 Q Right. I'm asking you how it looks and whether it is
21 simply a matter of point the mouse and click on what you
22 want. Is that the way you understand it looks on a
23 customer's system?

24 A I don't know about the customer's system.

25 Q If we turn to page two, is page two the beginning of

1 the search process that you engaged in?

2 A No.

3 Q What is depicted on page two?

4 A The same things we just looked at.

5 Q Do you see that the categories bar has been
6 highlighted?

7 A You must be on slide three.

8 Q I'm sorry. You are correct, sir. What does page
9 three depict?

10 A It's the beginning of the category search.

11 Q So what page -- withdrawn. Do you understand -- claim
12 elements, please.

13 Do you understand that the searching for matching
14 items is a separate method step that occurs after the
15 selection of the product catalogs to search?

16 A Say that again, please.

17 Q Do you understand in your consideration of
18 infringement opinions on claim 26 that searching for
19 matching items among the selected product catalogs comes
20 after selecting the product catalogs to search?

21 A These steps don't have to be performed in order.

22 Q Do they both have to be performed?

23 A Yes.

24 Q Were they performed in order here?

25 THE COURT: Which order? They were performed in

1 some order.

2 MR. THOMASCH: Thank you, Your Honor.

3 Q In this instance, and by this instance I mean your
4 demonstration that you used as a basis for your
5 infringement opinion, 1135-A, was the step of selecting
6 the product catalogs to search performed?

7 A Yes.

8 Q Was the step of searching for matching items among the
9 selected product catalogs performed?

10 A Yes.

11 Q Which step was performed first?

12 A The selecting the product catalogs.

13 Q Can you show me where you selected the product
14 catalogs?

15 A Certainly.

16 Q And specifically, I'd like to see where you selected
17 either or both of the Office Max and Diablo product
18 catalogs to search.

19 A Slide eight.

20 THE COURT: Is that represented by the -- what is
21 it -- five catalogs listed beginning with IBM?

22 THE WITNESS: There are five items in the vendor
23 master from different vendors.

24 THE COURT: Oh, okay.

25 Q Does that represent the selection of the Office Max

1 catalog, sir?

2 A This selects the catalogs.

3 Q Do you mean the items or the catalogs?

4 A The catalogs.

5 Q Which catalogs are selected?

6 A It's Office Max and Diablo which we find out, not on
7 this page --

8 Q How many different IBM catalogs did you select, or did
9 you not select IBM catalogs?

10 A I did not select an IBM catalog.

11 Q On page 1135-A-008, I see reference to IBM ThinkPad
12 T20 as well as an IBM enterprise server. Are those
13 separate IBM catalogs?

14 A Those are items.

15 Q Those are items from an IBM catalog.

16 A It doesn't say from -- who is selling it for that
17 particular one.

18 Q Does that tell you that it's an Office Max catalog?

19 A You would have to click on the item number to
20 determine that.

21 Q Okay. I want to know -- before you click on the item
22 number and search, I want to know, can you select the
23 Office Max catalog and say, I just want to look, I like
24 Office Max products, I like those, so I want to look for a
25 desk, but I don't want to look at all the desks in the

1 world, I want to look at Office Max desks, can you -- did
2 you, in your demonstration, show how to do a -- how to
3 select an Office Max catalog?

4 A I could have done that with a keyword search, but
5 that's not what this demonstration was about.

6 Q This demonstration did not show the selection of any
7 particular vendor's catalog or any assortment of specific
8 catalogs; is that correct?

9 A No.

10 Q No, it's not correct?

11 A It is not correct.

12 Q Tell me which catalogs you selected before you engaged
13 in the search.

14 A In this case, the selection and the search are
15 combined by clicking on the third-level UNSPSC code,
16 computers, I find those items from the catalogs that match
17 the query term.

18 Q Can you click using UNSPSC and find only items from a
19 specific vendor?

20 A No.

21 Q Can you use UNSPSC to find only items from multiple
22 vendors like Diablo and Office Max?

23 A Yes.

24 Q And not items from others through --

25 THE COURT: What do you mean, not items from

1 others?

2 MR. THOMASCH: Withdrawn.

3 Q Can you use UNSPSC to search and bring up only, for
4 instance, laptops sold by Office Max and Diablo and not
5 also bring up laptops sold by other vendors that are in
6 item master?

7 A If they are coded to the same code, then it will bring
8 up all of them.

9 Q Because item master searches for items, not for
10 catalogs; correct?

11 A In this case, we searched for items and catalogs
12 simultaneously.

13 Q There are two separate steps; correct?

14 A Well, there are two elements, but since they don't
15 have to be performed in order, they can be performed
16 together. That's what my demonstration is.

17 Q So your testimony is you did not perform the second
18 step of selecting the catalogs to search before you
19 performed the third step of searching the catalogs;
20 correct?

21 A I performed elements two and three -- I practiced
22 elements two and three simultaneously.

23 Q Using UNSPSC, can you pull up all Office Max items
24 that are sold through catalog and only the items sold by
25 Office Max?

1 MS. ALBERT: Asked and answered.

2 THE COURT: Sustained.

3 Q You mentioned keyword coding. You did not show in
4 your demonstration or discuss in your testimony yesterday
5 keyword coding, did you?

6 A Yes.

7 THE COURT: I thought he mentioned keyword
8 search. Is that what you are referring to? He said he
9 could do a keyword search. That's different than doing
10 the coding.

11 Q In your expert report in regard to this demonstration,
12 is there reference to keyword searching?

13 A It's in the other demonstration.

14 Q Okay. And keyword --

15 THE COURT: Excuse me. It's in 1134-A?

16 THE WITNESS: Yes, Your Honor.

17 Q It's in the Punchout demonstration, not in the item
18 master demonstration; correct?

19 A Correct.

20 Q And when you do keyword coding, you don't get only --
21 if I did a keyword code because I want to buy an Apple
22 iPhone, and I put in Apple, I wouldn't only get products
23 out of the Apple catalog, would I, sir?

24 THE COURT: Excuse me. Your question changed
25 from searching to coding, and I don't know if there's a

1 difference or you intend a difference.

2 MR. THOMASCH: There isn't, Your Honor. I --

3 THE COURT: To me there is a difference, but
4 that's just because I'm a layperson.

5 MR. THOMASCH: It's actually because my question
6 is not as specific as it should be. It's my fault in the
7 question. It's not --

8 THE COURT: Good; I'm glad somebody else takes
9 the blame. I've gotten more than my share already today.

10 MR. THOMASCH: That one I'm happy --

11 THE COURT: Not from you all but other sources.

12 Q All right. In this instance in item master, you did
13 not use a keyword search; correct?

14 A Correct.

15 Q And if you use a keyword search in item master, what
16 will come back are all items in the item master that
17 have -- that are associated with that word such as every
18 product from that company no matter who sells it and in
19 whose catalog it was originally; correct?

20 MS. ALBERT: Objection; relevance. Lawson, to my
21 knowledge, doesn't have any allegation that they've
22 modified any feature of item master, so I don't really
23 understand what the relevance of all this line of
24 questioning is.

25 MR. THOMASCH: We had direct examination

1 yesterday, and a witness said this --

2 THE COURT: Overruled.

3 MR. THOMASCH: Thank you.

4 Q In the demonstration that you relied on, was there any
5 selection of a catalog as opposed to a selection of items
6 that came from catalogs?

7 A As I explained, elements two and three were performed
8 simultaneously.

9 MR. THOMASCH: Move to strike as nonresponsive,
10 Your Honor.

11 THE COURT: I think it's very responsive. He
12 said it, I think, three times that he did it together, he
13 did it simultaneously, and you don't have to do it in any
14 order, but the way he did it for purposes of this
15 demonstration was to do the two steps together. That may
16 be right or wrong, but that's what he said three times
17 now.

18 Q On what basis did you make the determination that the
19 selection of items using UNSPSC codes fulfilled the claim
20 element of selecting the catalogs to search?

21 MS. ALBERT: Asked and answered.

22 THE COURT: I'm not sure I agree with that. Go
23 ahead. If you understand the question, answer it.

24 THE WITNESS: I do.

25 A On slide eight, if I click on the item number for the

1 ThinkPad, that brings up the item detail page, and that
2 gives me the catalog information. So that's when I
3 selected the catalog, when I clicked on item number.

4 Q And what catalog came up?

5 A For the IBM ThinkPad, it was Office Max.

6 Q And is everything in the Office Max catalog then
7 available to you on this page?

8 A No, just that one item.

9 Q Just one item from the catalog?

10 A Just the one item I selected.

11 Q And did items come up from other catalogs?

12 A On the item detail page.

13 Q On this page, page eight.

14 A Well, we do have items from other catalogs on this
15 slide eight.

16 Q Did you select those catalogs intentionally?

17 A Yes.

18 Q Which catalogs did you select?

19 A Well, when I clicked on the item number for a
20 ThinkPad, I got -- it showed that that was from the Office
21 Max catalog. When I clicked on the item number for the
22 Dell computer, it showed me that that was from the Diablo
23 catalog.

24 Q So you figured out what catalog you had after the
25 search result was made apparent to you; is that right?

1 A Yes.

2 Q And I just want to go back to the claim elements,
3 please. With reference to the relationship between the
4 second and third terms where it says, selecting the
5 product catalogs to search, the following term is
6 searching for matching items among the selected product
7 catalogs.

8 Are you under the impression that the Court has
9 specifically addressed whether those two steps need to be
10 done in sequence or may be done simultaneously?

11 A I think they can be done simultaneously.

12 Q And was that --

13 THE COURT: I don't think that's the question,
14 though. I think what his question was, are you aware of
15 whether in some opinion that I've issued I have said they
16 could be done simultaneously or otherwise. Are you aware
17 of anything I've said on the topic, I think, is his
18 question.

19 MR. THOMASCH: It is.

20 Q Were you relying on an order of the Court that I'd
21 like to find out about that would specifically address
22 this issue, or did you have a different reason for
23 believing that you could do them together, not
24 sequentially?

25 THE COURT: You mean different than an order of

1 the Court.

2 MR. THOMASCH: Different from an order of the
3 Court.

4 A I believe you could practice these simultaneously
5 because they don't have to be done in order.

6 Q Right, and what I want to know is whether your belief
7 that they don't need to be done in order is because of
8 your expertise in patent law, your plain reading of the
9 claim, or an order of the court.

10 A Plain reading of the claim.

11 Q So your plain reading of searching among the selected
12 product catalogs doesn't require you to have first
13 selected the product catalogs to search; right?

14 A I did them simultaneously.

15 Q When you interpreted the claim, did you first form a
16 belief -- before you actually did the demonstration, did
17 you first form a belief as to whether or not selecting
18 catalogs to search needed to come before searching among
19 the catalogs?

20 A I believe they could be done simultaneously.

21 Q And you did that based on your plain -- your reading
22 of the plain meaning of the terms.

23 A Yes.

24 Q I believe you mentioned early on your direct testimony
25 that claims 28 and 26 have the first five elements in

1 common; is that correct?

2 A Correct.

3 Q Claim 28 then adds a converting step; right?

4 A Correct.

5 Q That is that's not present in claim 26?

6 A Correct.

7 Q Claim 26 has a sixth step that adds an inventory
8 checking step; correct?

9 A Correct.

10 Q That's not present in 28?

11 A Correct.

12 Q The inventory step is necessary in order to have
13 infringement of claim 26; correct?

14 A Correct.

15 Q The inventory step cannot be performed without the use
16 of either Punchout or EDI among the configurations that
17 were at issue in this case; correct?

18 A Correct.

19 Q I'm sorry?

20 A Correct.

21 Q Now, your demonstration doesn't implicate Punchout at
22 all; correct?

23 MS. ALBERT: Asked and answered.

24 THE COURT: You are talking about 1135-A?

25 MR. THOMASCH: Yes, I am.

1 Q Correct?

2 MS. ALBERT: Objection; asked and answered.

3 THE COURT: Does it use Punchout?

4 MR. THOMASCH: Punchout is not part of his
5 demonstration at all.

6 THE COURT: I think he's already said that.

7 MR. THOMASCH: I think he did. I just wanted to
8 --

9 THE COURT: Listen, I was paying attention. I'm
10 pretty sure he said it maybe more than once. Let's go.

11 Q So in this case, your -- what you are doing here is
12 looking at the relationship between item master and EDI;
13 correct?

14 A I don't understand your question.

15 Q All right. In the demonstration, were you purporting
16 to show that the first five elements could be fulfilled by
17 item master in RQC and then you would need to have either
18 EDI or Punchout in order to do the next step; correct?

19 A Correct.

20 Q And because you didn't use Punchout, you were relying
21 on EDI to do that next step; right?

22 A I know from the documentation that if the
23 demonstration system had contained EDI, we would have been
24 able to show the sixth inventory determination step, but
25 because we didn't get EDI, I could not put it in the

1 demonstration.

2 Q I understand, but what you were attempting to show was
3 RQC with item master and EDI can perform the six elements
4 together; correct?

5 A Or Punchout. Punchout or EDI.

6 Q Was Punchout what you were demonstrating?

7 A No.

8 Q Was your testimony yesterday intended to suggest that
9 Punchout had a role in the performance of the first five
10 steps?

11 A Not in this demonstration.

12 Q Are you suggesting that you cannot use Punchout in the
13 first five steps but Punchout can then be in the sixth
14 step?

15 A No.

16 Q With RQC?

17 A No.

18 Q Okay. In this demonstration, were you attempting to
19 show that item master and EDI together can do the six
20 elements?

21 A That was the conclusion, yes.

22 Q May I have just a demonstrative showing configurations
23 three and five.

24 You mentioned your demonstration was in relationship
25 to configuration three and five. Configuration five

1 contains electronic data interface or EDI; correct?

2 A Correct.

3 Q Configuration three does not; correct?

4 A Correct.

5 Q So the demonstration you did was, in fact, related to
6 configuration five alone, not configuration three, and you
7 demonstrated the first five elements and then said, with
8 EDI, we could have all six; right?

9 A Right.

10 Q Configuration three, without the use of Punchout,
11 could never infringe claim 26; correct?

12 A Correct.

13 Q You are in configuration three. Even under your view
14 of infringement and your view of the claims, you need to
15 use Punchout in order to infringe claim 26 because there's
16 no other way to check inventory?

17 A Correct.

18 Q Now, neither claim 26 nor claim 28 was found to be
19 infringed at trial in regard to any configuration that did
20 not contain Punchout; correct?

21 MS. ALBERT: I object that we're retreading the
22 jury verdict and the trial. I think that was the subject
23 of the Court's order.

24 THE COURT: I think we're going too far over the
25 line now, Mr. Thomasch. I've given you considerable

1 leeway because you're on cross-examination to test the
2 validity, but he actually gave a demonstration. You all
3 provided him with the material from which he was able to
4 use the demonstration. You didn't provide all of it. He
5 did what he said. He explained it.

6 If that's sufficient, it's not. If it is, it
7 isn't, but we don't need to now go back and re-plow what
8 happened at the trial. Whether or not -- the question is
9 beyond where we need to go.

10 MR. THOMASCH: Your Honor, I only have two
11 questions for him that relate to the impact on his
12 opinion. I'm not trying to prove any objective fact, just
13 whether or not he considered something. I would ask that
14 I be able to put that on the record as an offer of proof.

15 MS. ALBERT: Objection; same objection that it's
16 the subject of your order, and you prohibited us from
17 re-treading the trial and, you know, looking into the
18 minds of the jury. And he's already made a motion for an
19 offer of proof. I think that's already been made.

20 THE COURT: All right. What do you want?

21 MR. THOMASCH: I would like to find out whether
22 he considered that fact --

23 THE COURT: Do you want to ask the question and
24 have me sustain an objection to it so that it's in the
25 record? Is that what you are asking me to do?

1 MR. THOMASCH: Yes, Your Honor.

2 THE COURT: Ask the question, and then if she
3 objects, places her objection, I'll rule on it if it's the
4 same question and same objection.

5 MR. THOMASCH: I'll only have two questions that
6 are intended to draw the objection, Your Honor. I don't
7 mean to belabor this in any way.

8 THE COURT: Try it out and see. Let's go.

9 Q Did you consider, in forming your opinions in this
10 case, your infringement opinions in this case, Dr. Weaver,
11 that neither claim 26 nor claim 28 was found to be
12 infringed at trial in regard to any configuration that did
13 not contain Punchout?

14 MS. ALBERT: Objection; relevance.

15 THE COURT: Sustained.

16 Q Did you consider that ePlus alleged that item master
17 and EDI, in the context of configuration four, infringed
18 claim 26 and the jury rejected that allegation?

19 MS. ALBERT: Objection; relevance.

20 THE COURT: Sustained.

21 Q Dr. Weaver, if you had had EDI when you did the
22 demonstration three months before -- withdrawn.

23 If you had EDI at the time you did the demonstration,
24 you would have then included screen shots from that;
25 correct?

1 A Correct.

2 Q And you testified on direct to what that process would
3 have been and how that would have handled the sixth
4 element; correct?

5 A Correct.

6 Q Are you in any way -- is there anything you need in
7 order to convey to the Court and to counsel your opinion
8 that EDI would satisfy this sixth element?

9 A True.

10 Q That's clear; correct?

11 A Yes.

12 Q That's your opinion. Does EDI have a role in the
13 first five elements?

14 A No.

15 Q When does the inventory checking occur --

16 THE COURT: You mean does EDI have a role in
17 performing the first five elements?

18 MR. THOMASCH: I'll withdraw the question and
19 rephrase it.

20 THE COURT: It clearly has a role in the
21 effectuation of it according to everybody's evidence.

22 Q In performing the first five elements of claim 26, do
23 you need to use EDI at all?

24 A No.

25 Q If you had had EDI available to you, it would have

1 changed the screen shots in your book. Would it have
2 changed your opinion in any way?

3 A No. I would simply be able to demonstrate that EDI
4 can tell you what's available in inventory.

5 Q May I go over now to the Punchout demonstration. That
6 was, I believe, shown on screen shots at PX-1134-A. Do
7 you see that?

8 A Yes, it's up now.

9 Q Okay. And if you recall, in that demonstration that
10 you testified about yesterday, it ultimately concluded
11 with your demonstrating how to purchase one Global desk
12 from Staples; correct?

13 A Correct.

14 Q Now, in that demonstration, did item master come into
15 play at all?

16 A No. This was about Punchout.

17 Q So this was about going to Punchout, making a
18 selection, building a requisition, checking out, and
19 having Punchout perform that checking inventory step; is
20 that right?

21 A That's correct.

22 Q So I believe page two shows that you are going to
23 Punchout; is that right?

24 A That's right.

25 Q Then on page three, did you have a choice at that

1 point to punch out to the Staples site or punch out to the
2 Dell website?

3 A Yes, I did.

4 Q And which choice did you elect?

5 A Staples.

6 Q Now, if a Lawson client with configuration three or
7 five -- withdrawn. Both configurations three and five
8 have Punchout in them; correct?

9 A They do.

10 Q If a Lawson client with configuration three or five
11 had Punchout relationships with Dell and Staples only, as
12 shown in this limited demonstration, would the
13 configuration satisfy element one of claim 26 which
14 requires, quote, maintaining at least two product catalogs
15 on a database containing data related to items associated
16 with the respective sources?

17 A Yes.

18 Q Where is the database for the Punchout catalogs?

19 A One of those is at Staples, and one is at Dell.

20 Q And who maintains those databases?

21 A Staples and Dell in partnership with Lawson.

22 Q Does the customer maintain -- may I have claim one,
23 please.

24 Does the customer maintain a database containing data
25 related to items associated with the respective sources?

1 A There would be the seller, Staples or Dell.

2 Q And does Staples maintain the Dell catalog on its
3 database?

4 A No.

5 Q Does Dell maintain the Staples catalog?

6 A No.

7 Q Are there one database or two databases?

8 A Those are two separate databases.

9 Q They are two separate databases, each containing one
10 vendor's catalog; correct?

11 A Correct. Don't forget about item master. Although it
12 wasn't used in the demonstration, it's still present, and
13 it still contains multiple catalogs in a single database.

14 Q Did item master have anything to do with the
15 demonstration by which you said you were showing
16 infringement?

17 A I was just showing Punchout.

18 THE COURT: Wait a minute. The answer to the
19 question is, yes, it did, on 1135. It did not on 1134;
20 right? So let's get straight what we're talking about.

21 Q Right. The demonstration I'm now talking about is
22 exclusively 1134, and is it fair to refer to it as a
23 Punchout only demonstration?

24 A Yes.

25 Q In testifying about how to use Punchout to fulfill the

1 items of claim 26, did you indicate that you needed to use
2 item master to show infringement of claim 26 in the
3 Punchout demonstration, 1134?

4 A No. I merely pointed out that it was present.

5 Q I need to be able to ask you questions about the
6 demonstration you gave when you said, I'm showing how
7 infringement can occur.

8 A Sure.

9 Q You didn't suggest in your testimony that what you
10 were showing was the only possible way that you could
11 infringe; correct?

12 A You are correct.

13 Q But what you showed, what you have in the snapshots
14 and what you testified to before the Court is a basis for
15 your opinion that this system can be used to infringe
16 claim 26.

17 A Correct.

18 Q You do understand by your reading of the plain
19 language of the claim that the step of maintaining at
20 least two product catalogs on a database containing data
21 related items associated with the respective sources must
22 be performed in order for there to be direct infringement?

23 A Sure.

24 Q Did you have an opinion when you did the demonstration
25 that is reflected in Exhibit 1134 as to what the database

1 was that fulfilled element one of claim 26?

2 A Yes.

3 Q And what was the database?

4 A That would be the database in a multi-vendor Punchout
5 catalog.

6 Q Was there a multi-vendor Punchout catalog anywhere
7 referenced in this demonstration?

8 A Not in this demonstration.

9 Q Okay. I am asking you about the demonstration that
10 you gave the Court --

11 THE COURT: No. What you asked him was about
12 what his opinion was. It wasn't confined to the
13 demonstration. He answered the question you asked. If
14 you want to ask a different one, you can ask it.

15 Q Let me ask you about the demonstration, the Punchout
16 only demonstration reflected in Exhibit 1134. That
17 demonstration did not show punching out to a multi-catalog
18 vendor or a multi-vendor catalog; correct?

19 A Correct.

20 Q So in the demonstration that you showed, where was the
21 database containing data related to items associated with
22 the respective sources?

23 A There were -- there's a database at Staples, there's a
24 database at Dell, and there's a database in the item
25 master.

1 Q And who maintained the databases? Separate
2 individuals?

3 A Separate companies.

4 THE COURT: Separate companies being --

5 THE WITNESS: Staples and Dell and Lawson
6 maintaining the item master. Or a customer.

7 THE COURT: Earlier you said something about
8 Lawson in partnership with Staples and Dell. Are you
9 talking about the same thing or different?

10 THE WITNESS: The partnership is the ability of
11 the Lawson software to remain connected when you punch out
12 to Dell or Staples, but Staples maintains their database.

13 Q Punchout gives a Lawson customer access to the Staples
14 website that has been sort of specially configured for
15 that customer; correct?

16 A Correct.

17 Q And gives them access to potentially a modified
18 Staples catalog but some Staples catalog; correct?

19 A Correct.

20 Q That catalog is actually maintained by Staples, but
21 the access is through the Lawson system; correct?

22 A Correct.

23 Q Now, in the answer before His Honor had a follow-up
24 question, you mentioned at the end that the catalogs may
25 have been maintained by Lawson in item master; do you

1 recall just saying that?

2 A Yes.

3 Q That wasn't part of your demonstration; correct?

4 A Correct.

5 THE COURT: In 1134.

6 MR. THOMASCH: In 1134.

7 Q Correct?

8 A Yes, that's correct.

9 Q So you had a demonstration that we talked about
10 earlier that only involved item master and EDI, and in the
11 second demonstration that we're now talking about, 1134,
12 you used Punchout and not EDI and not item master;
13 correct?

14 MS. ALBERT: Objection; asked and answered.

15 MR. THOMASCH: Just for clarification, Your
16 Honor.

17 THE COURT: Mr. Thomasch, I think it's clear here
18 that there were two different demonstrations, that they
19 each had different purposes, and they are not
20 all-encompassing, and they were exactly what they were
21 purported to be which was a demonstration and not the
22 entire proof of the entire case about everything. And I
23 think you've established that fairly well, and you can go
24 on to something else if you'd like to.

25 Q If you would turn to page 16 of 1134, please. Am I

1 correct that this shows adding a desk to the cart at
2 Staples?

3 A That's correct.

4 Q And then feel free if there's something important in
5 between, but I'd like to next walk you through to page 20.
6 Do you see where the submit button is highlighted?

7 A Yes.

8 Q And so that would be, in effect, checking out of
9 Staples so that you would then return to the Lawson RQC?

10 A Correct.

11 Q And that's shown in slide 21?

12 A Yes. This is returning the items from the Staples
13 shopping cart to the Lawson requisition lines.

14 Q Okay. And you are back with both Staples and Dell
15 being shown as the Punchout vendors that are available
16 through this -- on this demo machine; correct?

17 A That's correct.

18 Q Page 22, if you flip ahead, this shows now that that
19 desk from Staples has been placed into the requisition
20 lines; correct?

21 A Correct.

22 Q May I go to the claim terms, please. Is that entry of
23 the Staples desk, the desk from Staples, into requisition
24 lines, is that relevant to the performance of any of the
25 six steps of claim 26 that are on the screen?

1 A It's requisite for building the requisition.

2 Q So the fourth element of claim 26 is building a
3 requisition using data related to selected matching items
4 and their associated sources; correct?

5 A Correct.

6 Q And so in this instance --

7 MS. ALBERT: Objection; I think you misread the
8 claim elements.

9 Q Let me reread it to be better -- to appear more
10 accurately in the transcript.

11 It's building a requisition using data relating to
12 selected matching items and their associated source(s),
13 period; correct?

14 A Correct.

15 Q Is it your testimony that this single item that
16 appears in the requisition lines satisfies the fourth
17 element of claim 26?

18 A Yes.

19 Q Now, at this point in the demonstration --

20 THE COURT: That's on slide 22, Dr. Weaver.

21 THE WITNESS: Yes, Your Honor, slide 22.

22 Q At this point in the demonstration, you proceeded
23 ahead to go through the checkout process that would
24 involve generating a purchase order; correct?

25 A Lawson now calls it the release process.

1 Q You went through the release process; correct?

2 A I did.

3 Q But for purposes of building the requisition, that
4 single item from the Staples Punchout site, that was
5 sufficient to satisfy the fourth element in your opinion;
6 correct?

7 A Correct.

8 Q At that point in the process, could you have gone back
9 to Dell, purchased an item from Dell and brought it
10 forward and put it on the same requisition?

11 A No.

12 Q Could you have at that point, if you had wanted to,
13 kept the requisition open, gone to item master, brought
14 back an item master item from some source other than
15 Staples, and added it to the requisition?

16 A No.

17 Q Indeed, you couldn't even go to item master to get a
18 Staples item to put on the requisition, could you?

19 A Correct.

20 Q Because you can't get into item master when you have
21 an item in requisition lines through a Punchout search;
22 right?

23 A Right.

24 Q Now, you have previously had familiarity with how RSS
25 worked; correct?

1 A Correct.

2 Q In RSS, with RSS, you could have done a very similar
3 search to what you just did; correct?

4 A Yes.

5 Q And by what you just did, I mean what you are
6 testifying about now which is the demonstration that's
7 reflected in the screen shots at 1134-A.

8 A Yes.

9 Q But with RSS, you could have gone -- after buying the
10 item or putting the item into requisition lines, you could
11 have then sought to add into the requisitioning process an
12 item from a different source, specifically Dell; right?

13 A You could.

14 Q In that instance, the fourth item would have been
15 satisfied by building a requisition that had multiple
16 sources; correct?

17 A The fourth element?

18 Q Yes.

19 A Yes.

20 Q Are you aware that neither party in the underlying
21 litigation asked the Court to construe the fourth element
22 of claim 26?

23 A Yes.

24 Q So were you relying, when you formed your opinions on
25 infringement of claim 26 through the activities that you

1 demonstrated in 1134, were you relying on your
2 understanding of the plain language of that claim?

3 A Yes.

4 Q You testified on direct right at the very beginning, I
5 believe it was actually in the morning session in one of
6 the first or second questions, that RQC can be used to
7 perform all steps of claim 26; do you recall that?

8 A Yes.

9 Q It's not your opinion, is it, that all uses of
10 configurations three and five infringe claim 26; correct?

11 A Let me go back to that last question, because I don't
12 think that was accurate. Maybe we should go look up my
13 testimony to see what I said.

14 Q How about if I modify it, because I think I know where
15 you are, and if you are, I think it deserves
16 clarification.

17 Would it be right to say that you indicated that RQC
18 can be used to perform the first five elements of claim
19 26?

20 A I said RQC and the surrounding procurement system
21 could be used to show the first five elements of claim 26.

22 Q So put more broadly, configuration three and
23 configuration five, in your opinion, can be used to
24 infringe claim 26?

25 A Correct.

1 Q But all uses of configuration three and configuration
2 five are not infringing; correct?

3 A All uses?

4 Q Are there ways that a user can productively use
5 configuration three or configuration five to perform
6 intended purposes of the software and not infringe claim
7 26?

8 MS. ALBERT: Objection; beyond the scope of my
9 direct.

10 THE COURT: What difference does it make if
11 there's some -- let's assume there's one use that doesn't
12 infringe.

13 MR. THOMASCH: Your Honor --

14 THE COURT: That still infringes if there are
15 other uses that do.

16 MR. THOMASCH: There are many uses that don't,
17 Your Honor, and in trying to understand what is infringing
18 and what is not in his opinion, I would like to know where
19 the line is that he's drawn and what he has on each side.

20 THE COURT: What difference does it make is her
21 point, I think.

22 MR. THOMASCH: Well --

23 THE COURT: She didn't cover that in her
24 examination.

25 MR. THOMASCH: This is an infringement case --

1 THE COURT: I understand that, but you don't try
2 what's not infringing in an infringement case.

3 MR. THOMASCH: Well, they have brought a claim of
4 indirect infringement. They have brought a claim of
5 contributory infringement, and the issues, the issues of
6 substantial non-infringing uses, Your Honor, are central
7 and will be up before the Court when the damages witnesses
8 testify.

9 THE COURT: I haven't seen that in anybody's
10 evidence so far.

11 MR. THOMASCH: I believe Dr. Weaver's
12 expert report -- may I ask?

13 THE COURT: Go ahead, but you are confusing the
14 issues that have to be decided here, I think. She didn't
15 cover it. I'm sustaining her objection. It's beyond the
16 scope of her direct examination, and if you want to cover
17 another -- cover it another way, perhaps you can, but not
18 with that question. In addition to that, it's so broad I
19 don't know that anybody could ever answer it. You'd have
20 to know what all other people do.

21 Q Dr. Weaver, in your expert report, did you offer an
22 opinion that RQC and configurations three and five have no
23 substantial non-infringing use?

24 A Yes.

25 Q Is that your opinion?

1 A Yes.

2 MR. THOMASCH: Your Honor, may I continue?

3 THE COURT: With a question that is permissible,
4 sure.

5 Q When you did the demonstration in 1135-A, were you
6 requisitioning a stock item from item master?

7 A Yes.

8 Q What stock item were you requisitioning in 1135?
9 Withdrawn. Maybe as a predicate, what is a stock item if
10 you understand that term?

11 A I think I misspoke. Stock item is something that's
12 already present in the company. The items that I was
13 looking at required ordering, so they were not stock
14 items.

15 Q So a stock item might be like yellow pads at a law
16 firm, and I want to have 100 available, they are in stock,
17 and if someone needs some and you have actually 300 in
18 stock, you say, I want five yellow pads, they come to you,
19 there's no purchase order; correct?

20 A That's right.

21 Q In that situation, you are using item master, but even
22 under your definitions and read of the claims, that's not
23 an infringement, is it?

24 A It's not, because there's no requisition and purchase
25 order.

1 Q And so that's why you didn't use a stock item in your
2 demonstration?

3 A Yes.

4 Q When you were -- when you requisition special items by
5 manually filling out requisition forms without searching
6 for a matching item, that wouldn't infringe claim 26,
7 would it?

8 A You have to do a search.

9 Q And that sort of thing, doing a specific requisition
10 where you know just what you want, you can go into item
11 master, write that in without ever searching, and you can
12 use item master to purchase that item; correct?

13 A Yes.

14 Q And that's within the capacity of configurations three
15 and five?

16 A Yes.

17 Q And also, you can purchase items through pre-completed
18 templates, like every month we'll order 100 yellow pads
19 automatically, you can do that through item master;
20 correct?

21 A Yes.

22 Q And that's not an infringement of claim 26.

23 A If there's no search.

24 THE COURT: You had to get a search to get there,
25 don't you?

1 THE WITNESS: You would have had to do a search
2 initially.

3 Q Do you have to do a search -- let's clarify. If you
4 are a law firm and you decide that every month you want to
5 order 100 yellow legal pads from Office Max, and you have
6 a standing template that you then, in January, in
7 February, and the first of March, you order 100 pads, is
8 that considered by you, the use of a template to fill out
9 recurring orders, is that a search within the meaning of
10 the claim language as you understand it in claim 26?

11 A No.

12 Q So if it's not, then doing so would not be infringing
13 claim 26; correct?

14 A Correct.

15 THE COURT: While he's asking that, do you have
16 to get a search to establish the template?

17 THE WITNESS: Yes, sir, you do.

18 Q Have you ever entered items in an item master?

19 A Not me personally.

20 Q Have you ever performed a template order using item
21 master?

22 A Not me personally.

23 Q Do you know how that process works and whether a
24 search is actually required?

25 A From the documents, it appears to me that the template

1 is filled as a result of doing searches, and then the
2 template gets saved and then can be reused.

3 Q And that -- your basis for that is what you've seen in
4 specific documents?

5 A Yes, that's right.

6 Q Can you identify any of those -- withdrawn. Does your
7 expert report identify any of those?

8 MS. ALBERT: Objection; I think this is beyond
9 the scope --

10 MR. THOMASCH: I'll withdraw the question.

11 MS. ALBERT: I'll stipulate --

12 THE COURT: He fished for it, the fact it's not
13 in his report. He fished for it, and you let it be
14 answered. You could have objected, but you didn't, and
15 now he's got to deal with the answer one way or the
16 another.

17 MS. ALBERT: Understood.

18 THE COURT: There's no reason to object, but
19 there's no reason to go any further. It's been
20 established.

21 Q Even in configurations three and five with users who
22 have Punchout or EDI, under your reading of the claims,
23 there is no infringement unless the Punchout or item
24 master vendors have the capability to check inventory;
25 correct?

1 A Say that again, please.

2 Q Under your reading of the claims with respect to
3 configurations three and five, Lawson users who have
4 Punchout and/or EDI capacity still cannot infringe claim
5 26 if they engage in a transition with a vendor who does
6 not have the capability to check inventory; is that
7 correct?

8 A I think that's correct.

9 Q Punchout vendors must support the capacity of
10 reporting whether the item you want is in inventory in
11 order for you -- that vendor to be part of an infringement
12 of claim 26; correct?

13 A Correct.

14 Q And the same holds true for transactions with EDI.
15 Even if the Lawson customer has EDI, unless the vendor
16 also has the capacity to do the electronic checking of
17 inventory, there will be no infringement of claim 26 under
18 your view; correct?

19 MS. ALBERT: Objection; relevance. Lawson has no
20 contention in this proceeding that it's made any
21 modifications to any inventory determining capabilities
22 that were found to infringe.

23 THE COURT: Beyond that, have you put in any
24 evidence of non-infringing uses that anybody is using? Is
25 there anything in the record about this? You are asking

1 him opinions in the air, and opinions in the air don't
2 mean anything unless they are tied to a non-infringing use
3 made by you or somebody else, and I haven't seen anything
4 in the record that shows that.

5 MR. THOMASCH: I believe, Your Honor, there has
6 been enormous discussion about the capacity --

7 THE COURT: I'm not talking about discussion.
8 I'm talking about a substantial non-infringing use, and
9 what you are doing is you are going into a bunch of
10 questions about something that, so far as I'm aware,
11 nobody put anything in the record about, but if I'm wrong
12 about that I want to know so I can refresh memory.

13 MR. THOMASCH: Dr. Weaver is providing testimony
14 about the capacity of the machines to perform substantial
15 non-infringing uses, and there is no good-faith dispute
16 about whether those uses take place. The burden of proof
17 is on --

18 THE COURT: No, the burden of raising a
19 substantial non-infringing use is on you, I think. You
20 have to put it up -- put it forward. Sustained on the
21 objection.

22 MS. ALBERT: Thank you.

23 THE COURT: Enough is enough.

24 Q Do the documents that you reviewed reflect that Lawson
25 customers use item master to purchase stock items?

1 A Can be used to purchase stock items, yes.

2 Q You've seen reference that they do, don't you?

3 A Yes.

4 Q You made reference to SciQuest on your direct
5 examination; correct?

6 A I did.

7 Q Am I correct that your opinion about SciQuest is the
8 Lawson customer who has a relationship with SciQuest has
9 the capacity to infringe claim 26 by going to SciQuest,
10 but you don't actually know of any customer who has done
11 so; is that right?

12 A No.

13 Q How many customers do you know of who have gone to
14 SciQuest?

15 A Cleveland Clinic.

16 Q Do you know of any others?

17 A That's the one I read about.

18 Q When Cleveland Clinic went to SciQuest, what did they
19 do? What did they purchase?

20 A I don't know.

21 Q Did the purchase, in your mind, infringe claim 26?

22 A It has the capacity to infringe claim 26.

23 Q We are talking about infringement. I want to know if
24 you are aware of any evidence that Cleveland Clinic used a
25 Lawson system to infringe claim 26.

1 A I know that Cleveland Clinic asked about using
2 SciQuest and got reassures that using SciQuest would work
3 just fine and would bring back multiple items from
4 multiple vendors, put on one requisition, and generate
5 multiple purchase orders. I think it's a reasonable
6 assumption that if they ask that question, they are using
7 that functionality.

8 Q And in your answer just then about what was reasonable
9 to assume, you ticked right through five of the six
10 elements but did not mention determining whether a
11 selected matching item is available in inventory; correct?
12 Is that true that you did not mention that?

13 A I did not mention it.

14 Q Even if you went to SciQuest, unless there is a
15 determination of whether a selected matching item is
16 available in inventory, there's no infringement of claim
17 26; correct?

18 MS. ALBERT: Asked and answered, Your Honor.

19 THE COURT: Overruled.

20 A There would not be.

21 Q What is your understanding about the capacity of
22 SciQuest or partners of SciQuest to do -- to determine
23 whether selected matching items are available in
24 inventory?

25 A We know that the SciQuest system has hundreds or

1 thousands of catalogs, and so I believe it's possible to
2 check inventory there.

3 Q Through which catalogs?

4 A I don't know their names.

5 Q You are just making an assumption based on numbers; is
6 that correct?

7 A Yes.

8 Q Do you have any information about a single --
9 withdrawn. You have previously done demonstrations
10 similar to the two that you spoke about in court in order
11 to provide bases for infringement opinions; correct?

12 MS. ALBERT: Objection. I think now we're
13 retreading the trial record, and that's not relevant.

14 MR. THOMASCH: I'm not retreading the trial
15 record. I am --

16 THE COURT: What are you asking? I don't even
17 understand the question, to tell you the truth.

18 MR. THOMASCH: I'm asking him whether he has
19 previously, and he has at trial, I understand that, but
20 has he previously done demonstrations --

21 THE COURT: In his other work as an expert, has
22 he done demonstrations?

23 MR. THOMASCH: In the course of this case, Your
24 Honor, I'll limit it to.

25 THE COURT: What does that have to do with

1 anything if they're not in evidence here?

2 MR. THOMASCH: I would like to contrast the
3 demonstrations he did before with the demonstrations that
4 he --

5 THE COURT: Demonstrations he did at trial?

6 MR. THOMASCH: Yes.

7 THE COURT: With demonstrations he did here.

8 MR. THOMASCH: Yes.

9 THE COURT: Objection sustained.

10 Q One last -- withdrawn.

11 MR. THOMASCH: Nothing further, Your Honor.

12 THE WITNESS: Thank you.

13

14 REDIRECT EXAMINATION

15 BY MS. ALBERT:

16 Q Good morning, Dr. Weaver.

17 A Good morning, Mrs. Albert.

18 Q Do you know whether or not the inventory control
19 modules sold by Lawson has a program enabling loading of
20 catalogs into the item master?

21 A I know it does.

22 Q Can you tell me whether or not the user of the
23 demonstration system that's reflected in the screen shots
24 of PX-1134-A maintains multiple catalogs in the item
25 master and connections to multiple Punchout catalogs?

1 A Yes, it does.

2 Q Now, with respect to the demonstration illustrated in
3 the slides of PX-1134-A, can you tell me whether or not
4 the requisition is built when an item is placed in the
5 requisition lines, or is it built at the time that the
6 release button is clicked?

7 MR. THOMASCH: Objection; very close to leading,
8 Your Honor. I think the proper question for her own
9 witness is how is it built or when is it built.

10 THE COURT: Overruled.

11 MR. THOMASCH: The question is suggesting the
12 answer.

13 THE COURT: Overruled. I don't think it does.

14 Q Can you tell me whether or not the requisition is
15 built by the Lawson system when the item is placed in the
16 requisition lines, or is it built at the time when the
17 release button is clicked?

18 A It is built after you click on the release button and
19 you get the popup window telling you that the requisition
20 has been created.

21 Q Is it the user of the system that queries the
22 inventory database of the Punchout vendor?

23 A Yes.

24 Q Is it the user of the system that receives the
25 purchase order acknowledgment report and can then

1 determine whether or not an item ordered is available in
2 the vendor's inventory?

3 A Correct.

4 Q Can we look at claim 26? Now, with respect to the
5 plain language of the fourth element of claim 26, does
6 that element require that a requisition built by the
7 system user include items associated with multiple
8 vendors?

9 A No.

10 MR. THOMASCH: Objection, Your Honor. Calls for
11 the witness to give a claim construction on what does the
12 claim require, and the Court has not done a claim
13 construction on this, and our witness was precluded from
14 offering his opinion about what was required by this step,
15 and I think it's a matter for the Court and not for Dr.
16 Weaver.

17 THE COURT: I would agree with that except that
18 you asked him about it and you asked him what his opinion
19 was and opened the door to it. And she didn't object to
20 it. I would have sustained the objection.

21 MR. THOMASCH: I asked if that's his opinion.
22 Ms. Albert asked what is required as if it were a ruling
23 from the Court. If she wants to rephrase as to his
24 opinion, I will withdraw.

25 THE COURT: I think that's a legitimate request

1 for revision.

2 Q In your opinion, does the plain language of claim 26
3 require that a requisition built by the system user
4 include items associated with multiple vendors?

5 THE COURT: Wait a minute. What you are asking
6 him -- in his opinion in forming the infringement analysis
7 did he hold that opinion; is that right?

8 MS. ALBERT: Yes, correct.

9 THE COURT: All right.

10 A It does not require multiple items from multiple
11 vendors in a single requisition.

12 MS. ALBERT: Thank you. Nothing further.

13 THE COURT: All right, can he be excused?

14 MS. ALBERT: Yes.

15 THE WITNESS: Thank you, Your Honor.

16 THE COURT: Can he be excused permanently? How
17 about you all?

18 MR. THOMASCH: No, Your Honor.

19 THE COURT: All right, you can be excused
20 permanently, Dr. Weaver. We'll take a 20-minute recess
21 and change court reporters.

22

23 (Brief recess.)

24

25

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1 MS. ALBERT: Your Honor, for the record,
2 ePlus rests its infringement case.

3 THE COURT: All right.

4 All right, sir.

5 MR. MARK: Elizabeth Homewood, please.

6

7 ELIZABETH HOMEWOOD, called by the Defendant, first
8 being duly sworn, testified as follows:

9

10 DIRECT EXAMINATION

11 BY MR. MARK:

12 Q Good morning, Ms. Homewood.

13 A Good morning.

14 Q Would you lean into the microphone a little bit or
15 move it closer to you and then give your name to the
16 court reporter and spell your last name, please?

17 A Elizabeth Homewood, H-O-M-E-W-O-O-D.

18 Q Ms. Homewood, where do you work?

19 A I work for Infor.

20 Q What do you do there?

21 A I'm the senior director for support operations.

22 THE COURT: You're what?

23 THE WITNESS: Senior director for support
24 operations.

25 Q What is the support option?

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1 A Support operations is the department that's
2 responsible for providing support to our customers if
3 they have questions on the software or if they're
4 experiencing a problem running the software, or
5 anything like that, they reach out to us to answer
6 those questions.

7 Q How long have you worked for Infor?

8 A Just over three years.

9 Q By Infor with the three years, are you including
10 within that working for Lawson?

11 A I'm sorry, yes.

12 THE COURT: Is Lawson still an extant company
13 or has it been merged into Infor?

14 THE WITNESS: It was merged into Infor just
15 over a year ago, I believe. It's no longer an
16 affiliate. It's part of Infor now.

17 THE COURT: And it didn't exist anymore?

18 THE WITNESS: Correct.

19 THE COURT: So if I wanted to Google Lawson,
20 I'd come up with its past, but not its presents?

21 THE WITNESS: Correct.

22 THE COURT: Not that I am.

23 BY MR. MARK:

24 Q Can you just give a brief overview of your career
25 background and the work you've done before you came to

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1 Lawson?

2 A Prior to Lawson I worked for a company called Soft
3 Brands, Incorporated. And I worked in -- I started in
4 their technical consulting team for a few years. Then
5 I spent about 15 years in their support operations
6 department at Soft Brands. And then in 2009, I left
7 Soft Brands and went to Lawson in their support
8 operations team.

9 Q So, adding up, you've had about 18 years of
10 experience in software and support operations?

11 A Yes.

12 Q Let me direct your attention to May 2011. Were
13 you aware towards the end of that month that this
14 court issued an injunction involving certain Lawson
15 software products?

16 A Yes, I was.

17 Q How did you become aware of it?

18 A I was notified of the initial notification of the
19 injunction by my boss at the time, Nancy Anderson.

20 Q Were you given responsibilities at Lawson for
21 carrying out actions by the company to comply with the
22 Court's injunction?

23 A Yes, I was.

24 Q What responsibilities were you given?

25 A I was given responsibilities to help with the

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1 ceasing of the support aspect of that. So do you want
2 me to go into a specific --

3 Q Ceasing? Just for the court reporter, was that
4 c-e-a-s-i-n-g?

5 A Correct.

6 Q It sounded like CC at first.

7 A Sorry.

8 Q And about when did you become involved? About
9 when specifically, do you remember, did you get
10 involved with that?

11 A I believe it was on the morning of the 25th of
12 May.

13 Q Let me ask you to turn to the binder that's in
14 front of you to the tab with Exhibit 563, Defendant's
15 Exhibit 563. Do you see that?

16 A Yes.

17 Q Do you recognize this document?

18 A Yes, I do.

19 Q Did you prepare it?

20 A Yes.

21 MR. MARK: Your Honor, this document is on
22 the agreed upon list and I move it into evidence.

23 THE COURT: It's admitted.

24 MR. STRAPP: No objections.

25 (Defendant's Exhibit 563 is admitted.)

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1 Q Now, does this document set forth a timeline of
2 activities that you were involved in in connection
3 with implementing Lawson's response to the Court's
4 injunction?

5 A Yes. It would be their activities that I was
6 involved in in some way, yes.

7 Q The timeline begins on May 25. Could you read
8 that entry into the record, please?

9 A Received initial notice to discontinue service,
10 support and distribution of collateral of RSS
11 Procurement Punchout not part of RQC and M3 e
12 procurement in the U.S. for all non-healthcare
13 customers while emergency stay is being reviewed.

14 Q When you first became involved with this
15 implementation activity, had Lawson stopped selling
16 the software defined in the injunction?

17 A Yes.

18 Q Let me ask you to turn -- strike that. In terms
19 of the support operation, how does the support
20 function actually work in terms of customers
21 requesting and receiving support?

22 A There's a couple ways. Generally, customers will
23 log onto our customer portal and into what we call the
24 ticket incident management system. They will enter
25 their information, the question, that gets assigned to

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1 a support engineering. And the support engineer would
2 then follow-up with the customer either via like an
3 email type, typing it into the system, or a phone
4 call.

5 Q When a customer logs into the system is an
6 electronic record created of the customer putting in
7 its query?

8 A Yes. If a customer logs in and enters a support
9 ticket, there is a record of that support ticket in
10 our system.

11 Q When the customer initiates a request, does the
12 customer have to identify in some way the nature of
13 the problem for which they're seeking support?

14 A Yes. Generally, they're required to enter the
15 module and the screen if it's applicable, and then a
16 summary description of what their issue is.

17 THE COURT: What are we doing here? I'm not
18 sure where we're heading.

19 MR. MARK: Your Honor, where we're headed
20 into is describing how the company implemented actions
21 in response some Your Honor's injunction.

22 THE COURT: Ask her the bottom line question.
23 Did they stop? She said they stopped selling the
24 software. Now ask her if they stopped servicing the
25 software.

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1 MR. MARK: We actually had testimony from
2 Mr. Hanson on that.

3 THE COURT: Maybe that's through. So why are
4 we doing what's she's doing?

5 Q What's the difference between service and support
6 at Lawson?

7 A The difference is the services team is responsible
8 for installing, implementing and consulting on the
9 software. The support team is responsible for
10 answering questions or addressing problems with the
11 software.

12 Q Let me ask about a third category of items. Are
13 you familiar with the term "maintenance"?

14 A Yes.

15 Q What's maintenance?

16 A Maintenance is the actual code fix or delivery of
17 fixing problems within the code.

18 Q How is maintenance provided to Lawson customers?

19 A The development team is responsible for doing the
20 maintenance. It's provided to the customers through
21 the support team.

22 Q Maintenance consists, for example, when you have a
23 particular software product and there's an update and
24 there's a patch, a customer maintains their software
25 by going to the website and downloading and installing

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1 the patch, right?

2 A Yes, that would be correct.

3 Q So that's maintenance as distinguished from
4 support and service?

5 A Correct.

6 Q Okay. Did Lawson stop all three, maintenance,
7 support and service in response to the Court's
8 injunction?

9 A Yes, we did.

10 Q Relating to the enjoined products, correct?

11 A Correct.

12 Q Okay. Let's talk about how Lawson stopped the
13 support function because that's your area, right?

14 A Yes.

15 Q How many support -- how many people work in the
16 support area for Lawson?

17 A Currently or --

18 Q At the time of the injunction, May 2011.

19 A At that time the Lawson support team was just over
20 320 people or so.

21 Q Did you disseminate to the support team policy
22 regarding the provision of support after the
23 injunction?

24 A Yes.

25 Q How did you do that?

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1 A It was done through a combination of verbal
2 meetings and emails.

3 THE COURT: Excuse me. I'm confused now.
4 Did you stop providing support or did you provide
5 support after the injunction?

6 THE WITNESS: We stopped providing support.

7 Q Did you communicate the direction to stop
8 providing support to the support technicians?

9 A Yes, I did.

10 Q Are you familiar with a Lawson feature called
11 knowledge base?

12 A Yes, I am.

13 Q What is knowledge base?

14 A Knowledge base is an online database or repository
15 of information regarding all of the products where
16 customers can through self service, they log onto the
17 website in the knowledge base, and they can search for
18 information and solutions themselves without ever
19 contacting the support team.

20 Q Did Lawson change the knowledge base for the
21 products covered by the injunction after the
22 injunction issued?

23 A Yes, we did.

24 Q What did Lawson do to the knowledge base for the
25 products covered by the injunction?

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1 A We did a comprehensive search on the terms related
2 to the products and we removed all of the articles,
3 the documentation. Any patches or information related
4 to the products was taken out of the knowledge base
5 for customer view.

6 Q So customers could not get after the injunction
7 material from Lawson advising them on how to fix or
8 adjust certain things in the software covered by the
9 injunction, correct?

10 A That would be correct, yes.

11 Q Are you familiar with a service --

12 THE COURT: Excuse me a minute. Do you
13 dispute that they stopped providing maintenance,
14 support and service for the infringing products,
15 Mr. Strapp?

16 MR. STRAPP: Yes, we do, Your Honor.

17 THE COURT: Obviously, they didn't for the
18 people who were covered by the sunset provision.
19 That's, obvious, I would assume, that they continued
20 to do that.

21 MR. STRAPP: We do --

22 THE COURT: Do you agree that you continued
23 to do it for the people covered by the sunset
24 provision.

25 MR. MARK: There were the 277 that were

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1 identified for the sunset provision, that's correct,
2 but otherwise we understand that they have contested
3 this and we want to illustrate --

4 THE COURT: That's what I'm trying to get at.

5 MR. STRAPP: We do contest the issue. In
6 fact, we presented evidence they were instructing
7 customers on how to run RSS and RQC in parallel. That
8 came in yesterday.

9 THE COURT: That's what you're talking about,
10 that kind of evidence?

11 MR. STRAPP: In addition to other evidence.

12 THE COURT: All right.

13 Your questions then about stopping the
14 maintenance, support and service do not pertain to the
15 maintenance, support and service of the adjudged
16 infringing products as to the 277 customers covered
17 under the sunset provision; is that correct?

18 MR. MARK: That is correct, Your Honor.

19 THE COURT: Do you understand that to be the
20 case, ma'am?

21 THE WITNESS: Yes, I do.

22 THE COURT: All right.

23 BY MR. MARK:

24 Q Are you familiar, Ms. Homewood, with a service
25 provided by Lawson where it hosts software for its

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1 customers and actually runs the software for its
2 customers?

3 A Yes, I am familiar with that.

4 Q Did Lawson provide hosting services to customers
5 who used the software configurations covered by the
6 injunction?

7 A Yes, they did.

8 Q After the injunction issued, what did Lawson do
9 regarding changing the software that had RSS and
10 changing it to RQC for these hosted customers?

11 A They contacted the customers and collaborated with
12 them to immediately migrate them or change them over
13 to RQC.

14 Q Are you aware that Lawson also provides system
15 administration services for customers who host Lawson
16 software in their own computer systems, but then use
17 Lawson to administer the software?

18 A Yes, I am.

19 Q Did Lawson for those customers who use Lawson
20 system administration for products covered by the
21 injunction, did Lawson change that software from using
22 RSS to installing and implementing RQC?

23 A Yes, they did.

24 Q After the injunction was issued, was a team formed
25 at Lawson with various responsibility to carry out

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1 steps for complying with the Court's order?

2 A Yes, there was a functional team put together.

3 Q You were part of that team?

4 A Yes, I was.

5 Q Did it meet regularly?

6 A Yes, we met at least daily initially.

7 Q Let me direct you to Plaintiff's Exhibit 1101 in
8 the binder in front of you.

9 THE COURT: Back at the back there. All the
10 way at the back. The last one.

11 Q The last 1.

12 A Okay.

13 Q Do you see the first page is a cover email from
14 Mary Jo Tinture to a long list of people?

15 A Yes, I do see that.

16 Q And were you part of the project team?

17 A Yes, I was.

18 MR. MARK: Now, Your Honor, I believe this
19 document is on the agreed upon list and I move it into
20 evidence.

21 THE COURT: All right. It's admitted.

22 (Plaintiff's Exhibit No. 1101 is admitted.)

23 Q If you turn to the fourth page of the exhibit
24 you'll see a large spreadsheet.

25 A Yes, I see that.

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1 Q The spreadsheet is divided with white boxes and
2 occasion light blue rows dividing the white space,
3 correct?

4 A Yes, it is.

5 Q Do the blue lines on Exhibit 1101 reflect the
6 different areas of tasks or areas that were being
7 addressed by this team in implementing the response to
8 the Court's injunction?

9 A Yes, they do.

10 Q The group met. Did it meet in person, by phone or
11 by webinar?

12 A It was generally by phone and WebEx.

13 Q Now, let's turn to -- strike that.

14 In connection with the support operation which you
15 supervise, could you tell the Court in an average
16 month about how many support queries come into Lawson?

17 A On an average month for the team that I supervise,
18 about 7- to 8,000.

19 Q And turn in the binder to Exhibit 1058, which is
20 in evidence. Are these printouts of the type of
21 support communications you described earlier where a
22 customer will send in a query to Lawson and Lawson
23 will respond?

24 A Yes, that does look like what these are.

25 THE COURT: What? I'm sorry.

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1 THE WITNESS: Yes.

2 THE COURT: I have a seasonal adjustment.

3 MR. MARK: I'm enjoying the pollen myself,
4 Your Honor.

5 Q Are you able to, from your experience, are you
6 able when you look at various of these queries, are
7 you able to gather from the nature of the query what
8 the issue the customer is seeking to have Lawson
9 resolve?

10 A Generally, I can, yeah. Not always.

11 Q Are you able to tell, for example, are there some
12 queries where information is provided that allows
13 someone to interpret whether the customer is actually
14 running RQC?

15 A I'm sorry. Could you repeat that?

16 Q Is there information in some of these queries that
17 allows you to understand whether from the query you
18 can tell that the customer is running RQC?

19 A Yes. You often can tell that.

20 Q Turn if you would to page with the Bates No.
21 ending 415. I think it's the fourth page of the
22 document.

23 THE COURT: Ending what?

24 MR. MARK: 415. I'm sorry. 114815.

25 Q Do you see at the bottom of that page case 126805?

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1 A Yes, I see that.

2 Q And you see a dialogue that is initiated, I guess,
3 by involving a particular customer there between Linda
4 Ueland and Debbie Gunn?

5 A Yes, I see that first entry.

6 Q Do you see in the entry 6/7/2011 at 3:00:44 from
7 Debbie Gunn to Scott Hanson where it says, "Hi, Scott,
8 I received this error after installing RQC." Do you
9 see that?

10 A Yes.

11 Q Is that an indication that the customer has
12 installed RQC?

13 A Yes, absolutely.

14 Q Do you see in the response below that in reference
15 to a computer file RQC_config.XML?

16 A Yes, I see that.

17 Q Is that a file that is associated with implemented
18 RQC on a customer's system?

19 A Yes, it is.

20 Q Turn if you would to the page with the Bates
21 numbers ending 115251.

22 A Okay.

23 Q Do you have that?

24 A Yes, I do.

25 Q Do you see there a case -- I'm sorry. I gave you

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1 the wrong page. The next page ending in 252. The
2 case No. 132006.

3 A Yes, I see that.

4 Q Do you see the entry for June 21, 2011, at
5 9:29:55 p.m?

6 A Yes, I do.

7 Q Do you see the reference there where Anna Perez is
8 asking Mike Meyer, "Hi, Mike. Please send your
9 RQC_config.XML file for my review." Do you see that
10 entry?

11 A Yes.

12 Q Does that indicate that the customer is running
13 RQC on its system?

14 A Yes, it does.

15 Q Turn if you would to the page ending --

16 THE COURT: Is the bottom line here that
17 she's reviewed the records and sees evidence that some
18 of the customers are running RQC?

19 MR. MARK: The contention has been made --

20 THE COURT: Is that what you're asking?

21 MR. MARK: That's the bottom line.

22 THE COURT: Ask her that question. That will
23 kind of get us where we're going. And then maybe the
24 next question is: Were there some that didn't quite
25 make it? Were there some -- you know, we can get to

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1 the bottom line without going through every entry in
2 the document.

3 BY MR. MARK:

4 Q Taking the judge's question, you're aware from
5 reviewing these records that there are customers who
6 after the RQC upgrade to that new redesigned product
7 was made available they implemented RQC, correct?

8 A Correct.

9 Q And that activity started right from when the
10 injunction was entered and carried through, correct?

11 A That's correct.

12 Q Now, after the injunction was issued, are you
13 familiar with the term decommission notice?

14 A Yes, I am.

15 Q What is a decommission notice?

16 A A decommission notice is the notice to our
17 customers that we're ceasing or stopping development
18 and further sales or any related activities to a
19 particular product.

20 Q Did Lawson issue a decommission notice for RSS?

21 A Yes, we did.

22 Q Turn if you would to Defendant's Exhibit 557 in
23 front of the book. Is that the -- do you recognize
24 that as the decommission notice for RSS?

25 A Yes, I do.

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1 THE COURT: What exhibit is it? I'm sorry.

2 MR. MARK: Defendant's Exhibit 557.

3 THE COURT: All right.

4 MR. MARK: Your Honor, this is on the agreed
5 upon list and I would move it into evidence.

6 THE COURT: It's admitted.

7 (Defendant's Exhibit No. 557 is admitted.)

8 Q After a product is decommissioned, can anyone with
9 the product -- is maintenance available on that
10 product anymore?

11 A No, not once it's been decommissioned.

12 Q If someone buys or licenses Lawson software and
13 then after a time decides not to continue in a support
14 or maintenance relationship with the company, are
15 those people normally able to receive updates or
16 maintenance, whatever, on the product that they might
17 still be running on their computers?

18 A No. If a customer is not maintaining activity
19 maintenance on a product, then they are not entitled
20 to receive maintenance updates, patches, or any type
21 of support on that.

22 THE COURT: Does active maintenance mean
23 there's some kind of contractual arrangement and they
24 pay you for it or what do you mean by active
25 maintenance?

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1 THE WITNESS: Yes. What I mean is they have
2 paid for maintenance on that product and it's part of
3 their contract.

4 THE COURT: From time to time you get a
5 notice -- well, you can review your maintenance
6 program on this even though --

7 THE WITNESS: Right. So there's a regular
8 renewal period on the products and the customers
9 always have the option of whether or not to
10 maintaining that relationship and to pay for that
11 maintenance.

12 THE COURT: They don't, they don't get the
13 maintenance you're sending out. If they do, they do.

14 THE WITNESS: Correct.

15 Q Now, in connection with notification to customers,
16 you're aware that Lawson sent copies of the injunction
17 to every customer that had at some point licensed the
18 any one of the infringing configurations?

19 A Yes, I'm aware of that.

20 Q When I say "any customer," did that notice go to
21 customers who were not on any kind of activity
22 maintenance with the company?

23 A Yes, it did. It went to all customers.

24 THE COURT: All customers --

25 THE WITNESS: That had licensed the product

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1 at any point in time whether they were active or
2 inactive.

3 Q Was RQC made available for free to anyone who had
4 at any time licensed one of the infringing
5 configurations?

6 A Yes, it was.

7 Q So even for a customer who was no longer in an
8 active relationship with Lawson, the new product was
9 made available to them, correct?

10 A Yes, it was.

11 Q About how many customers make up that universe
12 that the notice went to between those on maintenance
13 and those who were no longer on maintenance when the
14 injunction issued?

15 A I believe that number was around 864.

16 Q How many in that 860 or so were no longer on
17 active maintenance in May of 2011?

18 A No longer on active maintenance for the product
19 was around 370, 380. Something like that.

20 Q Now, in terms of stopping support for Lawson
21 customers, did Lawson have a policy -- what was
22 Lawson's policy after the injunction issued regarding
23 the support it would provide?

24 MR. STRAPP: Objection; asked and answered.

25 THE COURT: I think you have.

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1 Q Let's then cut to the end. Are you aware now
2 about how many customers of Lawson as of May 2011 had
3 Configurations 3 or 5 at any point?

4 A Yes.

5 THE COURT: Configuration 3 or 5 what? I
6 lost the last word.

7 Q How many had Configurations 3 or 5 as of May 2011.

8 MR. STRAPP: Objection. Can we establish the
9 foundation that the witness understands what
10 Configurations 3 and 5 are?

11 THE COURT: Do you know?

12 THE WITNESS: Yes.

13 THE COURT: Do you know what those are and
14 what's been introduced here?

15 THE WITNESS: Yes, I'm aware.

16 Q You have seen the description of the components of
17 the Lawson products may make up Configuration 3 and 5,
18 correct?

19 A Yes.

20 Q How many customers are in that as of May 2011 who
21 had Configuration 3 or 5?

22 A About 135.

23 Q Is Lawson providing any type of maintenance or
24 support to any customer who's running its procurement
25 software Configuration 3 or 5 where that person is

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1 either not running RQC or not running anything?

2 MR. STRAPP: Objection. Vague as to time,
3 Your Honor.

4 Q Today.

5 THE COURT: Today?

6 Q Today.

7 A I'm sorry. Could you repeat the question?

8 Q I'll try it again. Is Lawson providing
9 maintenance or support to any customer who had license
10 Configuration 3 or 5 as of May 2011 where that
11 customer is not today either running RQC or is not
12 running either RQC or RSS?

13 MR. STRAPP: Objection, Your Honor. I'm
14 not --

15 THE COURT: I understand the part about RQC.
16 I don't understand the last part. So let's have
17 her --

18 MR. STRAPP: Your Honor, I have a different
19 objection as well. We asked an interrogatory during
20 discovery regarding which customers had actually --
21 were running RQC. We asked that very question. And
22 we received an answer that Lawson doesn't know who's
23 running RQC. They don't know a single customer. They
24 couldn't identify any for us. They know who had
25 downloaded RQC, but they didn't know who had

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1 implemented and installed RQC. And we waited.

2 THE COURT: That's the extant answer of the
3 company?

4 MR. STRAPP: Correct. Never supplemented
5 during the course of the discovery. I have a copy of
6 the interrogatory to hand up to Your Honor.

7 THE COURT: Hand it to him. He's going to
8 have to deal with it. You can show it to me after he
9 looks at it.

10 MR. STRAPP: Here's a copy for, Your Honor.

11 MR. MARK: Here is part of Plaintiff's
12 Exhibit 20, 1269, which I believe is in evidence.

13 THE COURT: I have 1269 up here already. I
14 have a copy of it already.

15 What interrogatory is it, Mr. Strapp?

16 MR. STRAPP: Response to interrogatory No. 3.

17 THE COURT: Three?

18 MR. STRAPP: Yes. I'm referring in
19 particular to the part of the answer at the top of
20 the --

21 THE COURT: Wait just a minute. I need to
22 get it. Okay. The question is, "Identify all
23 customers of any infringing system who have, (A)
24 uninstalled and/or removed RSS; (B) not uninstalled or
25 removed RSS; (C) installed and implemented RQC and not

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1 installed or implemented RQC. And then what's the
2 answer?

3 MR. STRAPP: Your Honor, if you carry over to
4 the next page at the top, the first sentence at the
5 top of that page that begins "Lawson is therefore not
6 in possession."

7 MR. MARK: Let me ask Your Honor to start
8 reading --

9 THE COURT: Just a minute. Let me read it.
10 Okay. Go ahead.

11 MR. MARK: Look at the preceding page.

12 THE COURT: All right.

13 MR. MARK: Start reading at the --

14 THE COURT: Where do you want me to read?

15 MR. MARK: Start at the last two lines of
16 that page.

17 THE COURT: For privacy purposes?

18 MR. MARK: Yes.

19 THE COURT: All right. So they have said,
20 though, in the next sentence that they are not in
21 possession of the information as to any of those
22 categories.

23 MR. MARK: As of -- may I lay a foundation
24 for why this witness should be allowed to go further
25 into this matter?

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1 THE COURT: You should -- if you want to go
2 into this, you should have updated the answer to that
3 interrogatory.

4 MR. MARK: Your Honor, the answer to the
5 interrogatory was, in fact, as Your Honor has heard in
6 earlier testimony, this answer is correct as of that
7 date. At Ms. Homewood's deposition --

8 THE COURT: I don't care about that. You
9 have to update the answer to the interrogatory if you
10 have a different answer.

11 MR. MARK: And further, the answer and the
12 information, as counsel knows, has been supplied to
13 counsel regarding Configurations 3 and 5, plus
14 Ms. Homewood received an accusation --

15 THE COURT: You're saying you did update?
16 When did you update the answer to the interrogatory?

17 MR. MARK: In connection with --

18 THE COURT: When connotes a date. And then
19 he can find it in his files.

20 MR. MARK: I will agree that the
21 interrogatory was not updated but information was
22 otherwise made available through the discovery and
23 deposition process.

24 MR. STRAPP: Your Honor, if he could
25 specifically tell me exactly when that information was

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1 supplemented that's responsive to this interrogatory,
2 by whom in discovery, whether it was in a specific
3 document or discovery response, I'll take a look, but
4 I don't believe that that's the case.

5 THE COURT: Go back there and talk to him and
6 tell him. Go back there and tell him so he can find
7 it, if you would.

8 MR. STRAPP: Your Honor, I think this is
9 going to come up in cross-examination as well because
10 Ms. Homewood testified at her deposition she was not
11 in possession of this information, and they never
12 supplemented her testimony either.

13 THE COURT: You are in disagreement over what
14 she said at her deposition. Go back to the table and
15 point him to where he should look and then maybe we
16 can resolve it.

17 (Counsel are conferring.)

18 THE COURT: You-all can't solve it?

19 MR. MARK: We can't solve it.

20 THE COURT: The rule says under Rule 26(e)
21 that you have to timely supplement or correct a
22 disclosure response if you learn that the response is
23 incomplete or incorrect and if the additional
24 corrective information has not otherwise been made
25 known to the other party during the discovery process

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1 or in writing.

2 So you must point specifically to someplace
3 in the discovery process or a writing that corrects
4 this information or you cannot get it in. So that's
5 all I'm asking you to do. To identify precisely
6 where. Obviously, it doesn't have to be a
7 supplemental answer, although that's the preferable
8 course to do, but you have to identify where. If you
9 say there is no updated interrogatory, you have to
10 then point to someplace otherwise in the discovery
11 where this information was provided. So point.

12 MR. MARK: Your Honor, I'll make it short. I
13 cannot point to that, but may I make a brief legal
14 argument on the issue?

15 THE COURT: I'll hear it.

16 MR. MARK: Two sentences.

17 THE COURT: Let's hope it's a good one.

18 MR. MARK: I don't know if it will be good
19 enough, but I'll make the point. The provision that
20 Your Honor cited in 26(e), we are well familiar with
21 it. What it goes to is whether the information
22 provided, whether information comes to an attorney
23 afterwards showing that the information provided at
24 the time was correct or not. There is nothing
25 incorrect about the interrogatory answer that Mr.

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1 Strapp brought to your attention.

2 At Ms. Homewood's deposition, the allegation
3 was made that Lawson buried its head in the sand
4 regarding customer information.

5 THE COURT: This is not helpful. You've got
6 to point to somewhere I can deal with it. You said
7 you can't, but there's some legal argument. So far
8 I've heard you say that the rule doesn't mean what it
9 says. I conclude to the contrary it does.

10 MR. MARK: I understand Your Honor's ruling.
11 The position that I would advocate is that with
12 respect to that reading of the Rule 26(e) under
13 "precedents" does not govern this situation because
14 the information that Ms. Homewood is prepared to
15 provide regarding the current status does not come
16 under the supplementation rule.

17 THE COURT: Because you have to correct this
18 information?

19 MR. MARK: Correct.

20 THE COURT: I understand what you said.

21 MR. STRAPP: Your Honor, my response is this
22 is exactly what Rule 26 and Rule 37 is designed to
23 preclude. A surprise at hearing with information that
24 wasn't provided during discovery.

25 THE COURT: Thank you. The objection is

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1 sustained.

2 MR. MARK: May I ask the Court to accept as
3 an offer of proof just marked for identification as
4 the offer Defendant's Exhibit 562A reflecting the
5 information --

6 THE COURT: You can put in an offer of proof
7 until the cows come home, but if you think the Federal
8 Circuit is going to pay a lot of attention to that, I
9 don't think it's going to, but you can put it in.
10 What is it?

11 There comes a time when you simply have to
12 acknowledge that you haven't obeyed the rule and
13 you've got to quit. And you-all need to learn that.
14 And offers of proof are appropriate if, in fact,
15 they -- and they are called for, and they are
16 recognized, and I appreciate it and encourage lawyers
17 to do it. But it's getting a little out of hand now.
18 So it's Exhibit 562A. It's in the record, but it's
19 not admitted.

20 MR. MARK: Thank you, Your Honor. No further
21 questions.

22 THE COURT: Thank you.

23 MR. STRAPP: Your Honor, I would just note
24 562A, I'm seeing it for the very first time. I guess
25 this just proves the point. This is something I've

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1 never seen before.

2 THE COURT: You have noted that, too. You
3 can deal with it.

4 Do you have a notebook for her?

5 MR. STRAPP: Yes, we do.

6 THE COURT: Let's get them up so we can get
7 going.

8 MR. STRAPP: Can we put up on the screen
9 Exhibit 583. I'm sorry. Plaintiff's Exhibit 1058.

10 THE COURT: 1058?

11 MR. STRAPP: Yes.

12 THE COURT: I think that's in that other
13 notebook, isn't it?

14 MR. STRAPP: That's correct.

15

16 CROSS-EXAMINATION

17 BY MR. STRAPP:

18 Q In your white notebook, can you turn to
19 Plaintiff's Exhibit 1058, please?

20 THE COURT: Do you see that, Ms. Homewood?

21 THE WITNESS: Yes, I see that.

22 Q Okay. Now, these pages aren't numbered in
23 sequential order, but if you could turn to the ninth
24 page, which has a Bates No. RQC 115250. Tell me when
25 you're there.

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1 A Yes, I see that.

2 Q Do you see in the middle of the page there there's
3 a customer 6178 Wi. Schools Consortium?

4 A Yes.

5 Q Is that Wisconsin Schools Consortium?

6 A Yes, I believe it is.

7 Q Is that a non-healthcare customer?

8 A Yes.

9 Q Can you look, please, at the second entry under
10 case 124617. Do you see that there is a date, May 27,
11 2011?

12 A Yes.

13 Q Do you understand that's after the Court's
14 injunction order, correct?

15 A Yes.

16 Q Do you see that there's references in this
17 question that says "Were they using RSS XML and
18 Procurement Punchout just fine and now they're getting
19 this error? If so, what installs or what changed on
20 their system?"

21 A Yes, I do see that.

22 Q Okay. Do you see down at the next time entry
23 there, May 27, 2011, 3:52:45 p.m. There's a dialogue
24 and it states, "Hi, Mindy - this is an RSS upgrade.
25 And the error occurs afterward." Do you see that?

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1 A Yes.

2 Q And then if you go down a few lines later to the
3 4:36:51 p.m. entry, am I reading this correctly: "So
4 this error is only happening to some users when using
5 RSS and Punchout?" Do you see that?

6 A Yes.

7 Q Can you tell me in your role as the global support
8 director for Lawson what your interpretation of this
9 discussion is here regarding the Wisconsin Schools
10 Consortium on May 27, 2011?

11 A Yes. It appears to be support engineer and
12 customer working on an issue, a product issue, with
13 the RSS.

14 THE COURT: A what?

15 THE WITNESS: A product issue for RSS.

16 Q And Punchout?

17 A Punchout is referenced here, yes.

18 THE COURT: Is that your way of saying that
19 there's support going on for RSS and Punchout as of
20 that date?

21 THE WITNESS: Yes, that's what's shown here.

22 THE COURT: All right.

23 Q Just to be clear, that would be after the
24 injunction for a non-healthcare customer, correct?

25 A That would be correct.

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1 Q And your understanding of Configuration 3 is it
2 includes RSS and Punchout, correct?

3 A That's correct.

4 Q Configuration 5 also includes RSS and Punchout,
5 correct?

6 A That's correct.

7 Q Could you on that same very page, can you go up
8 and you'll see towards the top there's a case 160235?
9 Do you see there's a date there, September 27, 2011?

10 A Yes, I see that.

11 Q September 27, 2011 was after the date of the
12 injunction, correct?

13 A Yes, that's correct.

14 Q Now, do you see in the dialogue here on the right,
15 it says, "Hi, Matt. Yes, both RSS and RQC can run at
16 the same time. It really just means that you would
17 now have three ways to enter in a requisition; RQ10,
18 RSS and RQC." Did I read that correctly?

19 A Yes, you did.

20 Q And as the global support director for Lawson at
21 the time, what's your interpretation of this dialogue
22 that's going on September 27, 2011?

23 A It appears support is responding to a question or
24 an inquiry regarding RSS and RQC.

25 Q What's the nature of the inquiry? What's your

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1 interpretation of the nature of the inquiry in your
2 role as global support director?

3 A It's hard to interpret everything, but looks like
4 a response to a question as to whether RSS and RQC can
5 run at the same time.

6 Q Do you believe that the answer that was given by
7 the support personnel is an accurate and consistent
8 answer regarding the capability of RSS and RQC to run
9 at the same time?

10 MR. MARK: Objection to foundation.

11 THE COURT: Overruled.

12 THE WITNESS: I'm sorry?

13 Q I'll ask that question again. In your role as
14 global support director, do you believe that the
15 information that was provided to this customer from
16 support personnel regarding RSS and RQC being able to
17 run at the same time is accurate and correct
18 information?

19 A I believe it's a limited answer in the sense that
20 she's not going into the detail as to what would be
21 required, but it's accurate that it could be done.

22 Q Do you have any reason to believe that it was not
23 done by customers?

24 A No.

25 Q And a customer would ask a question about running

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1 RQC and RSS in parallel to Lawson's support only if
2 they wanted to run RQC and RSS in parallel?

3 MR. MARK: Objection, speculative.

4 THE COURT: Sustained.

5 Q Could you turn to the exhibit that's in this white
6 notebook that you described as a decommission notice.
7 I believe it's DX-557. And if we could put that up on
8 the screen, please.

9 I want to direct your attention to the middle of
10 the document. There's a question in bold that says
11 when is RSS being decommissioned. Do you see that?

12 A Yes, I do.

13 Q Do you see that for a customer type, non-U.S.
14 customers outside the United States, the effective
15 date is November 23, 2011?

16 MR. MARK: Beyond the scope, Your Honor.
17 Objection.

18 THE COURT: I thought you asked her about the
19 decommission notice. Did you not?

20 MR. MARK: I didn't go into outside the
21 United States and outside the United States is beyond
22 the scope of the United States.

23 THE COURT: You really don't want to make
24 that objection, do you? Come on. Let's go.

25 Overruled.

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1 Q Do you see where I was reading from about non-U.S.
2 customers outside the United States effective date
3 November 23, 2011?

4 A Yes, I see that.

5 Q Is this decommission notice, am I interpreting it
6 correctly to read that Lawson's support personnel were
7 authorized to provide maintenance and support for
8 customers of the infringing configurations so long as
9 they were outside the United States from the
10 injunction up until November 23, 2011; is that
11 correct?

12 A At that point in time, yes.

13 Q Okay. And is it also correct that Lawson
14 personnel providing support to the non-U.S. customers
15 were based in the United States?

16 A Potentially, yes.

17 THE COURT: What did you say? Officially?

18 THE WITNESS: Potentially. We have support
19 personnel in multiple locations.

20 THE COURT: So they may have been inside the
21 United States, but they may have been elsewhere
22 outside the United States; is that what you're saying?

23 THE WITNESS: Correct.

24 Q Where were you working at this time on June 3,
25 2011? Where were you based?

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1 A I was based in St. Paul, Minnesota.

2 Q Were other personnel in the support organization
3 that were also based in St. Paul, Minnesota at that
4 time?

5 A As I mentioned, we have personnel in several
6 locations.

7 Q About how many employees in the support personnel
8 team were based in St. Paul, Minnesota, for Lawson as
9 of June 3, 2011?

10 A Approximately, maybe 100 to 125.

11 Q How many were there total at that time in the
12 support personnel team or organization for Lawson?

13 A About 325.

14 Q How many out of those 325 were based outside the
15 United States?

16 THE COURT: 325 minus 100 is 225.

17 Q I think there's some in St. Paul. Are there
18 others in other locations in the United States?

19 A Exactly. So outside the United States were
20 probably roughly around 200, just under 200.

21 Q Could you turn to Defendant's Exhibit 563 in the
22 same notebook, please. This is the document entitled,
23 Timeline for ePlus Patent Litigation."

24 A Okay.

25 Q Who asked you to put together this document?

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1 A I believe it was my boss at the time, Nancy
2 Anderson.

3 Q Nancy Anderson?

4 A Yes.

5 Q Is she still employed with Lawson?

6 A No, she's not.

7 Q Can you look at the entry under May 26 and
8 specifically the last paragraph under that last
9 sentence under that entry? Do you see it says,
10 "Communicated with is SCM team to reassign existing
11 cases to Mindy, Anna, and reinforced that we are no
12 longer to work cases related to RSS. They should be
13 stalled with we are researching your issue." Do you
14 see that?

15 A Yes, I see that.

16 Q Were you aware of any reason why customers were
17 not told why they weren't provided with support or
18 maintenance for RSS at that time and were instead
19 provided a message of we are researching your issue?

20 A At that point we were -- it was my understanding
21 we still had an emergency stay in place that we were
22 waiting on a ruling, and we didn't want to just turn
23 off the customer. So we ceased working on them, but
24 we didn't do anything more beyond that.

25 Q So your understanding as the global support

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1 director at the time was there was an emergency stay
2 that had been in place for the injunction entered by
3 the Court?

4 A There was an emergency stay that was being
5 requested.

6 THE COURT: You're saying when you use the
7 term "emergency stay," you mean you were asking for an
8 emergency stay, not that there had been one issued; is
9 that right?

10 THE WITNESS: Cross.

11 THE COURT: I think she just was using the
12 shorthand term.

13 Q Okay. If you could move down to the next day, May
14 27. And the second sentence there. Do you see that
15 it says, "Case admin skills updated to remove all
16 engineers from RSS product areas with the exception of
17 Mindy, Andrea and Anna"? Can you explain to me what
18 that sentence means?

19 A Case admin skills are -- the case was the support
20 ticket system at the time, and the admin skills were
21 the way the case would route or the system would route
22 incoming ticket incidents. So by updating the skills
23 to remove all engineers if a case were to come in, it
24 would go to Mindy, Andrea or Anna.

25 THE COURT: Does that mean that Mindy, Andrea

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1 and Anna were the people assigned to deal with
2 inquiries about the RSS product? Is that what that
3 means?

4 THE WITNESS: Exactly.

5 THE COURT: While he's looking, do you know
6 why the date in that November 23, 2011, is used in the
7 decommissioning notice for the healthcare customers
8 and non-U.S. customers?

9 THE WITNESS: The date for the healthcare
10 customers, it's my understanding that was the
11 exception where those 277 were allowed support and
12 maintenance through until that date.

13 THE COURT: So you stopped it for the
14 non-U.S. customers at the same time you stopped it for
15 the healthcare customers?

16 THE WITNESS: That was the intent at that
17 time, yes.

18 THE COURT: Is that what was going on there?

19 THE WITNESS: Yes. At that time that's what
20 we did, yes.

21 THE COURT: All right.

22 Q Lawson did not attempt to determine whether
23 customers that had a license to RSS actually
24 uninstalled or removed RSS from their systems, did it?

25 A I'm sorry. Could you say that again?

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1 Q Lawson did not attempt to determine whether
2 customers that had a license to RSS uninstalled or
3 removed RSS from their systems, did it?

4 A We did eventually, yes.

5 Q Ms. Homewood, do you recall being deposed in this
6 case on December 21, 2011?

7 A Yes, I do.

8 Q And you recall meeting with me for that deposition
9 in a conference room at Goodwin Procter's offices?

10 A Yes.

11 Q Do you recall that Lawson's attorney Mr. Thomasch
12 was there as well?

13 A Yes.

14 Q Do you recall you swore an oath to tell the truth
15 in that deposition?

16 A Yes.

17 Q And you understood at the time you gave that oath
18 that you were under the same obligation as you would
19 be in court to answer truthfully, right?

20 A Yes.

21 Q Could you please turn to the tab in the black
22 binder that says, "Deposition Transcript of Elizabeth
23 Homewood"? And I would direct your attention to page
24 19 of the document. And, specifically, line 16. This
25 is a transcript of your deposition, right?

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1 MR. MARK: What page?

2 MR. STRAPP: 19.

3 MR. MARK: Of the transcript.

4 MR. STRAPP: Correct.

5 Q Is this the transcript of your deposition,
6 Ms. Homewood?

7 A Yes, it appears to be.

8 Q All right. Can you please follow along silently
9 as I read aloud from line 16 on page 19.

10 "And did you attempt to determine whether
11 customers that had a license to RSS have uninstalled
12 or removed RSS from their systems?"

13 Answer: "Lawson doesn't have that information."
14 Did I read that correctly?

15 A Yes, you did.

16 Q And at the time of your deposition on December 21,
17 2011, you were not aware of any specific customer that
18 had previously licensed RSS before the injunction who
19 had uninstalled and removed RSS, right?

20 A At that time, yes.

21 Q And December 21, 2011, was about seven months
22 after the Court's injunction, right?

23 A Yes.

24 Q You weren't aware of a single customer that had
25 uninstalled RSS?

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1 A Not specifically. I mean, I'm sure there were
2 some. If I were to research all the ticket
3 information, I might be able to see that or talk to
4 the SWAT team.

5 THE COURT: That's kind of guessing, though.
6 That's something you could do. As of that time you
7 didn't know?

8 THE WITNESS: Right.

9 THE COURT: You said earlier today at some
10 point in time you had tried to find out who had
11 uninstalled it.

12 THE WITNESS: Correct.

13 THE COURT: When did that happen?

14 THE WITNESS: That happened early February of
15 2012.

16 THE COURT: After your deposition?

17 THE WITNESS: Yes.

18 THE COURT: All right.

19 Q Lawson did not attempt to determine whether
20 customers who have downloaded RQC have actually
21 installed and implemented RQC, did it?

22 A Can you say it again? I'm sorry.

23 Q Lawson did not attempt to determine whether
24 customers who had downloaded RQC have actually gone
25 ahead and installed and implemented RQC, did it?

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1 A We wouldn't have any way to determine that, so no.

2 Q As of your deposition December 21, 2011, you
3 didn't have any idea or even an estimate of how many
4 Lawson customers that had downloaded RQC had actually
5 installed and implemented RQC, correct?

6 A Correct.

7 Q Likewise, at the time of your deposition, you
8 didn't even have an idea or an estimate of the
9 customers who had uninstalled and removed RSS, right?

10 A Correct.

11 Q Now, customers who have downloaded RQC I think you
12 said can still run RSS; is that correct?

13 A With certain configurations.

14 MR. MARK: Objection. Beyond the scope of
15 direct actually. Although he did ask a question about
16 it earlier in his own cross.

17 THE COURT: Actually, I think that there was
18 some of the information you inquired about that had
19 them running it parallel as part of the inquiry. But
20 in any event, hasn't she already answered the
21 question?

22 Q Let me move along.

23 You're not familiar with whether anyone at Lawson
24 took any efforts whatsoever to get customers to
25 actually install and implement RQC rather than just

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1 installing RQC, are you?

2 A Not specifically. I mean, we had the SWAT team,
3 but that was their intent, but --

4 Q So your answer is you're not aware of any efforts
5 whatsoever that Lawson took to actually get customers
6 to install and implement RQC; is that correct?

7 A Not beyond testimony SWAT team, no.

8 Q Let me ask you to turn back to your deposition.
9 This is the tab of your deposition transcript. This
10 is the deposition at which you swore to tell the
11 truth --

12 THE COURT: She already acknowledged that and
13 I think we all understand what you do at the
14 commission of a deposition.

15 Q All right. Let me direct to you page 113 of your
16 deposition, please. And can you follow along with me,
17 please, as I read from the transcript starting at line
18 1 of page 113.

19 Now, Mr. Ansberry writes in his email in the
20 middle of the document after he's provided with
21 information from Ms. Orndorf regarding the master list
22 of customers, he writes, "Thanks. Between us, what is
23 troubling to me is that no one is doing the important
24 part, getting people to switch. It's no use that they
25 put the vitamins in their are basket. They were free

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1 after all. They have to be digested. Heads up. I'm
2 going to stir things up around getting deployment
3 moving. Are you familiar with whether anyone at
4 Lawson took any efforts whatsoever to get customers to
5 actually install and implement RQC rather than just
6 downloading RQC?"

7 Answer: "Not specifically, no."

8 MR. MARK: Objection. I don't think -- I
9 don't think that's impeachment of the previous
10 statement if that was the point of reading that.

11 THE COURT: I think that there is a
12 distinction between the answer given here and the
13 answer given there.

14 Who is Mr. Ansberry? Do you know? Is he
15 somebody in Lawson?

16 THE WITNESS: He was somebody in Lawson. I
17 don't know specifically what role he had.

18 THE COURT: All right.

19 Q Lawson keeps track of what products a customer has
20 using a record called the product configuration,
21 right?

22 A Correct.

23 Q Now, if a customer of Lawson downloaded RQC but
24 didn't actually install or implement RQC, am I correct
25 that the product configuration for that customer would

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1 nevertheless be updated to show that they had RQC
2 instead of RSS?

3 A Correct.

4 Q So a customer of Lawson could have a product
5 configuration that shows that that customer has RQC
6 yet Lawson would have no idea whether the customer was
7 still using RSS, correct?

8 A Correct.

9 Q I want to ask you about a few of your co-workers
10 at the time in 2011 that we're discussing, around the
11 time of the injunction. Do you know an individual
12 named Dan Davidson?

13 A Yes.

14 Q And at the time of the injunction, May 2011, Dan
15 Davidson was in charge of Lawson's partner and
16 alliance relationships, right?

17 A I don't know specifically. I know he worked in
18 the partner area. I don't know what title he had or
19 responsibilities.

20 Q Let me direct your attention to see if I can
21 refresh your recollection. If I could direct you,
22 please, to page 65, line 2. And if you could just
23 read to yourself from lines 2 to 5, and let me know
24 whether that refreshes your recollection regarding who
25 Dan Davidson is?

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1 THE COURT: I think that's the same thing she
2 just said, that she wasn't sure of his exact title,
3 but he was in charge of the partner and alliance
4 relationships.

5 Is that what you said earlier or did I
6 misunderstand your answer?

7 THE WITNESS: No, that is what I said. I
8 don't know his exact title. I know he works in the
9 partner alliances area.

10 THE COURT: Worked in and in charge of are
11 two different things. I understood you to have said
12 in charge of. Did you intend to say "worked in" when
13 you first answered the question or now? You're
14 drawing a distinction between worked in and in charge
15 of.

16 THE WITNESS: Two years later I know Dan
17 Davidson no longer works at Lawson.

18 THE COURT: So you don't recall?

19 THE WITNESS: Yeah.

20 Q At the time if he was in charge of Lawson's
21 partner and alliance relationships, would that mean he
22 was the primary contact for Lawson's third party
23 service support partners?

24 MR. MARK: Objection, foundation.

25 THE COURT: If you know.

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1 Q If you know?

2 A I would have to make an assumption there, yes.

3 THE COURT: No. But do you know?

4 THE WITNESS: No.

5 THE COURT: All right. She doesn't know.

6 Q Let me just direct you back to the very same page
7 of the deposition, and let me ask you to follow along
8 as I read aloud from page 65 line 6. And this follows
9 the answer you just previously gave regarding Dan
10 Davidson. And I asked you, Question: "What does that
11 mean?"

12 And you said, Answer: "He's the person -- he's
13 the primary contact for our partners or alliances that
14 we have with non-Lawson companies."

15 Does that refresh your recollection regarding the
16 specific responsibility that Dan Davidson had at that
17 time?

18 A It doesn't necessarily refresh my recollection.
19 Again, I know he worked in the partner area. I
20 haven't worked with him for a while. We're two years
21 later here so.

22 Q Okay.

23 THE COURT: To the best of your knowledge,
24 you gave an accurate answer when you gave it back at
25 the time of your deposition; is that right?

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1 THE WITNESS: Correct, yes.

2 THE COURT: Okay.

3 Q One more individual. Matthew Bragstad. Was he
4 the director of application support for the Americas
5 for Lawson at the time of the injunction?

6 A Yes, he was.

7 Q Okay. Could you please display on the screen --
8 let me ask you to turn in your binder first to
9 PX-1034. This is in the black binder. And if you
10 could display that on the screen, please.

11 If you look at the bottom of the email exchange
12 here, and that's on the second page of the document,
13 do you see that there's an email from Dan Davidson to
14 Matthew Bragstad and with a copy to you. The date is
15 June 8, 2011?

16 A Yes, I see that.

17 Q Now, Mr. Davidson wrote Mr. Bragstad, "Thanks,
18 Matthew. As a point of clarification, simply
19 downloading RQC will allow our affected RSS customers
20 to again receive support from Lawson, correct?" Do
21 you see that question?

22 A Yes, I do see that.

23 Q Then if you turn to the next email in the chain at
24 the bottom of page RQC 369859, do you see that Mr.
25 Bragstad replied to Mr. Davidson on June 8, 2011?

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1 A Yes, I see that.

2 Q And there's a copy of that email to you. Do you
3 see that?

4 A Yes.

5 Q Do you see that Mr. Bragstad replies, "Downloading
6 it changes their configuration. We have no knowledge
7 if they are running it or not. So we will support
8 them again." Did I read that correctly?

9 A Yes, you did.

10 MR. STRAPP: Now, Your Honor, I would like to
11 move for the admission over PX-1034 into evidence.

12 THE COURT: Any objection?

13 MR. MARK: No objection, Your Honor.

14 THE COURT: It's admitted.

15 (Plaintiff's Exhibit No. 1034 is admitted.)

16 THE COURT: Ms. Homewood, is that what was
17 going on, that customers who had RSS, once they
18 downloaded the RQC, they could get support, and there
19 were no questions asked about what was going on? Is
20 that right?

21 THE WITNESS: No. The downloading it would
22 change their product configuration. They could get
23 support on other products, not RSS, but they could get
24 support on HR, and payroll, and all the products that
25 they own.

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1 THE COURT: How did they get support on RSS
2 for the people who were getting support on RSS that he
3 asked you about at the beginning back in, say, like in
4 September? How did that happen? Was it just a
5 mistake?

6 THE WITNESS: The only RSS, there was a
7 handful of incidents out of the several thousand we
8 get every month that there were a few incidents,
9 isolated incidents where we had an issue. It was a
10 mistake on the part of the support engineer, and when
11 we discovered it, we put in measures to make sure we
12 stopped the support and that it didn't happen again.

13 THE COURT: All right.

14 Q Can you look on your screen, I have a slide up
15 there that's a building block demonstrative exhibit of
16 Configurations 3 and 5. Do you see that?

17 A Yes, I do.

18 Q Is that consistent with your understanding of what
19 software modules make up Configurations 3 and 5?

20 A Yes.

21 Q Let me ask you some specific questions. If you
22 could turn in your notebook just for reference back to
23 PX-1034. We'll leave this on the screen here. Now,
24 let's say a customer of Lawson downloaded RQC and that
25 customer had Configuration 5 on their system. Okay?

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1 A Okay.

2 Q And the customer didn't actually install and
3 implement RQC but just continued running RSS. Do you
4 understand my question?

5 A I believe so, yes.

6 Q Now, if that customer contacted Lawson after the
7 injunction and asked for support on procurement
8 Punchout, Lawson would provide support for Procurement
9 Punchout, correct?

10 A Correct. If they downloaded RQC and the product
11 configuration records showed RQC.

12 Q That's even if the customer hadn't actually
13 installed and implemented RQC, correct?

14 A Potentially, yes.

15 Q And that's even if the customer was still running
16 RSS, correct?

17 A It could be as we wouldn't know that at that point
18 in time, no.

19 Q Let's say that same customer said, I've electronic
20 data interchange, and I've a problem. I need a fix or
21 patch. I need maintenance or support. The Lawson
22 support personnel would provide to that customer
23 support and maintenance for electronic data
24 interchange; is that correct?

25 MR. MARK: Can we ask for clarification of

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1 time period.

2 Q After the injunction. And let's just say more
3 than six months after the injunction so we're not
4 within the sunset period for anyone.

5 A Okay.

6 Q Do you want me to ask the question again?

7 A If you could, please.

8 Q All right. We have a Lawson customer who has
9 Configuration 5. They download RQC. They don't
10 install or implement RQC, and they are continuing to
11 run RSS. Do you understand?

12 A Yes.

13 Q And the time period is seven months out from the
14 injunction. Okay?

15 A Okay.

16 Q That customer calls up Lawson support and says, I
17 need maintenance and support for electronic data
18 interchange. And my question is: Lawson would
19 provide support for that customer's electronic data
20 interchange module; isn't that correct?

21 A That is correct.

22 Q Now, you have that same customer, has RSS running,
23 had downloaded RQC but hadn't done anything. It's
24 just sitting there on their system, not installed and
25 not implemented, and the customer says to Lawson seven

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1 months after the injunction, I need support on all my
2 S3 procurement modules, purchase order, requisitions,
3 inventory control. I'm having problems with
4 generating purchase orders and I'm having problems
5 creating requisitions.

6 Lawson's support personnel will provide
7 maintenance and support to customer seven months after
8 the injunction; isn't that correct?

9 A They would provide support initially. If at any
10 point during that interaction it became apparent they
11 were running RSS, we would stop support at that point.

12 Q But if the Lawson support personnel were unaware
13 that the customer had actually not uninstalled RSS,
14 they would provide the support we just discussed,
15 correct?

16 A Correct.

17 Q And the same question with respect to
18 Configuration 3. The customer has Configuration 3,
19 downloads RQC, never teaches RQC. It's just sitting
20 there as a file on their system. They continue
21 running Configuration 3 with RSS. They call up Lawson
22 seven months after the injunction and say, Mr. Support
23 Manager at Lawson, I need some help. My Punchout's
24 not working. Lawson support will help support and
25 maintain the Punchout module for that customer of

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1 Configuration 3 seven months after the injunction
2 who's running RSS, correct?

3 A Until we discovered if they were running RSS, yes.

4 Q And Lawson -- excuse me. Can you please turn to
5 PX-1041 in your binder?

6 THE CLERK: I'm sorry. PX what?

7 MR. STRAPP: 1041.

8 Your Honor, I believe this is not objected
9 to. We would move for its admission into evidence.

10 MR. MARK: No objection.

11 THE COURT: It's admitted.

12 (Plaintiff's Exhibit No. 1041 is admitted.)

13 Q This is a meeting invitation that Jennifer Langer
14 sent to you on June 7, 2011, correct? You and others?

15 A Correct.

16 Q Do you see that there's a section of this meeting
17 invitation, it's the first section that's bold and
18 underlined and it says "situation"?

19 A Yes, I see that.

20 Q Do you see it says, "Upon further review, legal
21 has requested code changes to Procurement Punchout.
22 Product management concurs. This will require a patch
23 to RQC and to the 4 GL system." Do you see that?

24 A Yes.

25 Q Do you see the next section that's entitled,

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1 Impact on products and status, describes the patch
2 that was going to be made available to Lawson's
3 customers?

4 A Yes, I see that.

5 Q Do you see that that's called Patch 1?

6 A Yes.

7 Q Now, Lawson does not track information about
8 whether a specific customer has downloaded a specific
9 patch for RQC; isn't that correct?

10 A That is correct.

11 Q So Lawson has no way of knowing whether or not the
12 customers who downloaded RQC ever took a download of
13 Patch 1, correct?

14 A Not through any download records, no.

15 Q I think you testified earlier that Matthew
16 Bragstad was Lawson's director of applications support
17 for the Americas, correct?

18 A At that point in time, yes.

19 Q Now, as the support director for Lawson at the
20 time of the injunction, did you have any concerns that
21 no one had said to you outside of the Lawson
22 organization that the solution that Lawson had come up
23 with with RQC avoided infringement or was not in
24 violation of the injunction?

25 A I'm sorry. Could you say that again?

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1 Q Let me ask it a different way. From the period
2 after the injunction when you found out about the
3 injunction about what products it affected and you
4 learned that there was going to be this RQC module
5 made available. Did you have any concerns that no one
6 outside the Lawson organization had said, We agree
7 that this RQC solution solves the legal problems that
8 we're having?

9 A No, not to my recollection.

10 THE COURT: I'm having trouble understanding
11 how someone outside the Lawson organization would be
12 commenting about solving Lawson's legal problems.

13 MR. STRAPP: I'm sorry. I think it's my
14 confusion.

15 THE COURT: I don't understand that.

16 MR. STRAPP: That's my problem with the
17 question. Let me see if I can try to rephrase it.

18 Q Perhaps if I direct to you PX-1044, maybe this
19 will assist. Could you bring that up on the screen,
20 please.

21 Now, as of a month after the injunction -- let me
22 focus, sorry, on this document here. Do you see
23 there's a date June 23, 2011?

24 A Yes, I see that.

25 Q And do you see that this appears to be an instant

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1 message discussion between you and Matthew Bragstad
2 that's dated June 23?

3 A Yes, that's what it appears to be.

4 Q Do you see at the top of the document that Mr.
5 Bragstad asked you, "Does it scare you as much as me
6 that at this point nobody at the courts or ePlus has
7 said that RQC complies?" Do you see that?

8 A Yes, I see that.

9 Q Could you please read your response to his
10 question there at 2:02 p.m.? And this is June -- this
11 is June 23. So it's a month after the injunction. So
12 what's your response to Mr. Bragstad's question?

13 A Absolutely.

14 Q There's an exclamation point there, right?

15 A Yes.

16 Q What did you mean when you told Mr. Bragstad you
17 were absolutely scared as much as him that nobody in
18 the courts or ePlus had said that RQC complied?

19 A I wasn't scared so much whether the product
20 complied as much as what the impact that would have on
21 our customers and our operations if that were to be
22 the case.

23 Q Now, you see Mr. Bragstad responds to you at
24 2:03 p.m." He says -- before I ask you that, was it
25 your understanding at the time that neither the Court

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1 nor ePlus had said that RQC was in compliance with the
2 Court's injunction?

3 A If I recall correctly, it was just a comment that
4 there was a question as to there was something in
5 question as to whether or not RQC would be in
6 compliance.

7 Q And that scared you?

8 MR. MARK: Objection. It mischaracterizes
9 her testimony.

10 THE COURT: Overruled.

11 A It didn't. Again, I just said it didn't scare me
12 whether that would be found in compliance as much as
13 what scared me was we had just spent a month working
14 with our customers to migrate them and encourage them
15 to use RQC, and then to hear that potentially we'd
16 have to go through all that pain and impacted on our
17 customers again is what scared me, not the actual
18 product.

19 Q When Matthew Bragstad responded to you one minute
20 later at 2:03 p.m., he writes, "It also said that
21 Nancy and support in general are taking this a lot
22 more serious than the rest of the company right now.
23 This group almost seems like, This is so last year, or
24 maybe everyone has just checked out." Did I read that
25 correctly?

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1 A Yes, you did.

2 Q And you replied, "A little of both, I think." And
3 then I think you have a little smiley face there,
4 correct?

5 A Right.

6 Q What did you mean when you said that the rest of
7 the company besides support was not taking this
8 seriously and seemed like everyone had just checked
9 out?

10 A I don't think he said they weren't taking it
11 seriously. I think what he said is support was taking
12 it more seriously, and at this point in time we're a
13 month after the injunction, a lot of the tasks to
14 comply with the injunction for the other departments
15 were complete. Support was still dealing with this on
16 a day in and day out basis. So I think he was saying
17 it seems as if support is still dealing with this and
18 is more fully engaged, whereas, you know, the
19 marketing team that had already removed all of their
20 documentation, their role was done."

21 Q And support's role was done. Do you have any
22 understanding of why Matthew Bragstad was scared at
23 that point?

24 MR. MARK: Objection. That is a
25 mischaracterization of the testimony. She said

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1 support was continuing. Others were done.

2 THE COURT: He's right on that, isn't he?

3 MR. STRAPP: Your right. I'll withdraw the
4 question.

5 Your Honor, let me move into evidence this
6 exhibit. It's PX1044.

7 THE COURT: Any objection?

8 MR. MARK: No objection.

9 THE COURT: It's admitted.

10 THE CLERK: 1044 or 1041?

11 MR. STRAPP: PX-1044.

12 THE COURT: 1041 he just admitted. This is
13 1044.

14 THE CLERK: Thanks.

15 (Plaintiff's Exhibit No. 1044 is admitted.)

16 MR. STRAPP: Could I hand up something, Your
17 Honor. PX-1269, which is --

18 THE COURT: PX-1269 is the interrogatory
19 answers. right?

20 MR. STRAPP: Correct.

21 THE COURT: I've got them.

22 You know, there's a rule, don't you? That
23 you have to go through eternity strapped to your back
24 with all the papers that you present that are
25 unnecessary.

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1 MR. STRAPP: It would be heavy lifting.

2 Q Could I direct your attention, please, to
3 interrogatory No. 3.

4 And you'll see on the second page of that answer
5 there's a sentence at the very end that says, When RQC
6 is installed, customers automatically lose access to
7 RSS. Isn't it true that RQC and RSS can actually be
8 run in parallel?

9 MR. MARK: Objection, foundation.

10 THE COURT: Overruled.

11 A So you pointed me to a point here. What was the
12 question again? I'm sorry.

13 Q I want to just clarify that it's true, isn't it,
14 that RQC and RSS can actually be run in parallel?
15 Isn't that correct?

16 A Not without additional configuration.

17 Q And is it your understanding that Lawson provided
18 support and instruction to its customers on how to do
19 that additional configuration, to design RQC and RSS
20 to run in parallel?

21 A I've seen a couple isolated incidents on that,
22 yes.

23 MR. STRAPP: Thank you, Your Honor. I have
24 no further questions.

25 THE COURT: Redirect.

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REDIRECT EXAMINATION

BY MR. MARK:

Q Ms. Homewood, could I ask you to turn back to Exhibit in 1038 in the white binder.

A 1038?

Q 1050. I'm sorry.

THE COURT: 1058 or 1050?

MR. MARK: 1058.

THE COURT: Okay. She's got it.

Q And you were asked questions about a support interaction that appears on the pages starting 115250 to 115251 involving Wisconsin Schools. Do you recall that?

A Yes.

Q You were also asked about whether support would stop being provided if in the course of a support interaction the technician learned that the customer was running RSS. Do you recall those questions?

A Yes.

Q Turn if you would to 115251, and do you see the entries on June 1, 2011, between Megan Anderson and Mike Meyer? Do you see the entry there?

A Yes, I do.

Q Does that reflect a denial of support?

HOMEWOOD - REDIRECT

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1 A Yes, that is.

2 Q Does that reflect a denial of support after the
3 support entity learned that the customer was running
4 RSS?

5 A Yes.

6 THE COURT: Is that person named Mindy the
7 same person who was asked to be one of the three
8 people when the administrative skills --

9 THE WITNESS: Yes.

10 THE COURT: Same Mindy?

11 THE WITNESS: Yes.

12 Q Are you familiar with the term "canned message"?

13 A Yes, I am.

14 Q The paragraph June 1, 2011, 3:34:51 p.m., could
15 you read that into the record?

16 A "Thank you for contacting Lawson Global Support
17 with your question regarding requisition self-service,
18 RSS. Due to the recent court ruling regarding the
19 ePlus patent litigation, Lawson is no longer
20 supporting the requisition self-service, RSS, product.
21 For additional information regarding this court
22 ruling, please visit MyLawson.com. Requisition
23 center, RQC, the replacement product for RSS, is
24 available to you at this time free of charge from
25 Lawson. For more information, please visit

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1 MyLawson.com or contact your account executive. At
2 this point I will be closing your RSS case. I look
3 forward to supporting you on requisition center.
4 Thank you. Megan Anderson, supervisor, supply chain
5 management."

6 Q And in the support interactions, canned messages
7 were used to deliver a consistent message to customers
8 when support was stopped, correct?

9 A Correct.

10 Q Turn if you would to Exhibit 563 in your binder.
11 On the second page of the exhibit, can I direct your
12 attention to the entry for June 6? Do you see that?

13 A Yes, I do.

14 Q Now, you're asked questions on cross-examination
15 about the policy and the nature of the products where
16 support was being provided to customers. Did that
17 policy change over time?

18 A Yes, it did.

19 Q Does the entry on June 6 reflect a change to that
20 policy?

21 A Yes, it does.

22 Q What's the nature of the change from what was the
23 policy to what became the policy on June 6?

24 A On June 6 we expanded the stop support to all
25 product lines that run on the LSF platform until such

HOMEWOOD - REDIRECT

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1 time that the product configuration containing RSS had
2 changed." So that would include all product lines
3 such as HR, payroll, financials, anything that ran on
4 the LSF platform.

5 Q That policy continued in force?

6 A Yes, it did.

7 Q You were asked questions about providing support
8 to international customers and the time frame for
9 that. Do you recall how many customers Lawson had on
10 maintenance who were outside the United States?

11 MR. STRAPP: Objection. Vague as to which
12 customers. You mean all customers?

13 MR. MARK: Customers who had products covered
14 by the injunction.

15 A I'm sorry. Could you repeat the question?

16 Q Do you know how many customers outside the United
17 States had products covered by the injunction and were
18 on maintenance at or about the time the injunction was
19 entered?

20 A I don't recall the specific number. It was, you
21 know, a small amount. I think I remember around 20 or
22 something like that. Less than 20.

23 Q I'll provide with you a copy of what's been marked
24 as Plaintiff's Exhibit 1038. And I want to direct you
25 to the line --

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1 MR. STRAPP: Your Honor, if I may interpose
2 an objection. I think this is beyond the scope of my
3 cross, and he's introducing new material on redirect
4 that was not directing brought up on my cross.

5 MR. MARK: Mr. Strapp asked about the nature
6 of support being provided to international customers.
7 This goes directly to that issue. It's a document
8 that's not only marked, but that agreed upon.

9 THE COURT: Do you know it's a good idea to
10 ask some questions without documents? This document
11 is something she doesn't have any -- it doesn't even
12 mention her. And if it's in, it's in for whatever use
13 it's in for. So why do you need to ask her about
14 something she doesn't know anything about?

15 Let me hear your question, but apart from the
16 document.

17 MR. MARK: But I will move Plaintiff's
18 Exhibit 1038 into evidence.

19 MR. STRAPP: I don't object to the extent
20 it's on the agreed upon list, but I don't believe it
21 should be introduced with this witness because she's
22 not on the document. She has no firsthand knowledge
23 of it.

24 THE COURT: It's in.

25 (Plaintiff's Exhibit No. 1038 is admitted.)

HOMEWOOD - REDIRECT

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1 Q Was the mandate from --

2 THE COURT: So don't answer. You don't need
3 the document. You're not being asked about it
4 anymore, I think.

5 Q Was the mandate from Lawson to the support
6 organization to direct the international customers to
7 download and install RQC?

8 A Yes, it was.

9 Q Indeed, that was the mandate from the policy
10 mandate of Lawson for all of its customers who had
11 been running RSS, to download and to install RQC,
12 correct?

13 A Yes.

14 MR. MARK: Thanks. No further questions.

15 THE COURT: Can she be excused permanently?

16 MR. STRAPP: Yes, Your Honor.

17 THE COURT: Thank you for being with us,
18 Ms. Homewood. You may be excused.

19 (The witness was excused from the witness
20 stand.)

21 THE COURT: Do you have any other witnesses
22 on your infringement case?

23 MR. THOMASCH: Your Honor, we did have one
24 more witness on our list, Dr. Benjamin Goldberg. I
25 believe that in light of Your Honor's ruling striking

1 his opinion, and while there were certain issues that
2 were --

3 THE COURT: I didn't strike all of his
4 opinion.

5 MR. THOMASCH: I understand, Your Honor, but
6 you did strike the bases for his opinion, and you've
7 also -- he was going to come here to talk about issues
8 that directly related to that which you struck. And
9 we have decided to proceed forward without him. Your
10 general rule that prevents us from talking about what
11 happened at the first trial, that informs most every
12 aspect of his opinion. And because of that we're
13 respecting Your Honor's ruling that we're not to get
14 into the issue of what was contended and proved at the
15 first trial. With that limitation --

16 THE COURT: That isn't exactly what the
17 ruling was, but the ruling speaks for itself.

18 MR. THOMASCH: I understand, Your Honor, and
19 I meant in the course of our attempt to question, for
20 instance, Dr. Weaver, the way this has undergone, we
21 are not going to call Dr. Goldberg.

22 THE COURT: That's a decision that you can
23 make if you want to. All right. So you rest?

24 MR. THOMASCH: We rest, Your Honor.

25 THE COURT: Any rebuttal?

1 MR. STRAPP: Your Honor, our next witness is
2 here. We can call him or we can take a lunch break.
3 It's Dr. Ugone. It's your preference.

4 MR. STRAPP: He is not on infringement, is
5 he? We're on damages.

6 MR. STRAPP: Damages, that's correct.

7 THE COURT: How many witnesses are you going
8 to put on?

9 MR. STRAPP: Just one.

10 THE COURT: Did you succeed in honing.

11 MR. STRAPP: I did. I honed my best last
12 night.

13 THE COURT: Good. How long do you think his
14 testimony will be?

15 MR. STRAPP: I think definitely under an hour
16 and a half.

17 THE COURT: I'm not sure that's a big hone.
18 All right.

19 You have how many witnesses? Mr. Dusseault,
20 are you handing the damages part of it?

21 MR. DUSSEAULT: Yes, sir.

22 THE COURT: How many witnesses do you have?

23 MR. DUSSEAULT: I believe we only have one.

24 THE COURT: All right.

25 Now, somebody yesterday raised the question

1 about modifying the designations for Mr. Hager. Has
2 that been accomplished and is everybody in agreement?
3 And if you do, you need to give me a new set of
4 documents, so I read only what I'm supposed to read.

5 MR. STRAPP: We'll attempt to work it out
6 with counsel. We'd like to submit a slimmed down
7 version to make things more efficient.

8 THE COURT: You gave it to them, didn't you?

9 MR. STRAPP: We provided that to them not
10 last night, but the night before, but we haven't heard
11 a response he yet.

12 MR. THOMASCH: It was, Your Honor. Mr. Hager
13 was my witness. I defended both his depositions. I
14 need to be involved in that. And until I finish with
15 the witnesses this morning, I have not reviewed those
16 changes that were made after they were submitted after
17 we agreed.

18 THE COURT: I understand. I'm just trying to
19 figure out where we are. So it still has to done?

20 MR. THOMASCH: Yes, Your Honor.

21 THE COURT: All right. Have you all sorted
22 out, is there any significance to the fact Lawson
23 doesn't exist anymore?

24 MR. THOMASCH: No, Your Honor.

25 MR. STRAPP: I don't believe so, Your Honor.

1 THE COURT: In terms of this case.

2 MR. STRAPP: I don't believe so.

3 THE COURT: Well, for example, if an
4 injunction is issued, I think maybe it might make a
5 difference.

6 MS. ALBERT: I believe the injunction covers
7 successors.

8 THE COURT: Yeah, I know it does. So we
9 don't need to change the style of the case or
10 anything?

11 MR. MARK: No.

12 THE COURT: All right. Well, we'll take an
13 hour for lunch and we will come back and resume the
14 evidence.

15 (Luncheon recess taken at 1:00 p.m.)
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1 THE COURT: All right.

2 MR. STRAPP: Your Honor, ePlus calls its next
3 witness, Dr. Keith Ugone.

4 Your Honor, before we begin, ePlus would like to
5 offer into evidence several documents that Dr. Ugone
6 relied upon and that Lawson has agreed may come into
7 evidence. These are all exhibits that are on the
8 agreed-to list.

9 THE COURT: All right.

10 MR. STRAPP: They are PX-1080, 1081, 1082, 1241,
11 1242, 1243, 1246, 1247, and 1248.

12 THE COURT: They are admitted.

13

14 (ePlus Exhibits 1080, 1081, 1082, 1241, 1242,
15 1243, 1246, 1247, and 1248 admitted.)

16

17 **KEITH R. UGONE,**

18 a witness, called at the instance of the plaintiff,
19 having been first duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. STRAPP:

22 Q Good afternoon, Dr. Ugone.

23 A Good afternoon.

24 Q Would you please introduce yourself to the Court and
25 spell your name.

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1 A Sure. My name is Keith Raymond Ugone. Last name is
2 spelled U-g-o-n-e.

3 Q And where do you live, sir?

4 A I actually live in a little town called Grand Saline,
5 Texas, so about 75 miles east of Dallas or so.

6 Q What do you do for a living?

7 A I usually describe myself as wearing two hats. I call
8 myself a forensic economist and a damage quantifier.

9 THE COURT: And a what?

10 THE WITNESS: Damage quantifier.

11 Q What does that mean, sir?

12 A Well, the way I think about it is, is that it's not
13 uncommon for companies, much like ePlus and Lawson here,
14 to get in commercial disputes, and usually one of the
15 companies is alleging economic harm.

16 And so the forensic economics part of it is just
17 figuring out what happened and what would have happened in
18 the absence of the alleged wrongful conduct, and the
19 damage quantification part of it is quantifying the
20 damages or the amount of that harm or a measure of that
21 harm.

22 Q Have you prepared a demonstrative to help you
23 summarize your educational background and your
24 qualifications?

25 A I have.

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1 Q Is this the demonstrative that you prepared?

2 A Yes.

3 Q Would you please briefly describe your educational
4 background since high school?

5 A So my educational background is on the left-hand side
6 of this chart. I have a bachelor's degree in economics
7 from the University of Notre Dame which I received in
8 1977, and then I have a master's degree in economics which
9 I received from the University of Southern California in
10 1979, and then I received my Ph.D. in economics, again,
11 from Arizona State University in 1983.

12 Q What position do you currently hold?

13 A I am a managing principle at a company called Analysis
14 Group, Incorporated.

15 Q And what type of work is Analysis Group known for?

16 A Analysis Group does economic, financial, strategy
17 consulting type work for corporations, government
18 agencies, and law firms.

19 Q What do you do as a managing principle at Analysis
20 Group?

21 A Well, I do two things. One, I run the Dallas office
22 of Analysis Group, but in terms of the client service
23 work, I usually perform economic-related work or
24 damages-related work in a dispute type environment.

25 Q How long have you been a managing principle at

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1 Analysis Group?

2 A Since 2004, so a little over nine years.

3 Q What did you do before that?

4 A Prior to that, immediately prior to that, I was with
5 PricewaterhouseCoopers or its legacy firms, because there
6 was a merger between Pricewaterhouse and Coopers &
7 Lybrand, for about 18 years. I was a partner principle
8 there as well, but for a large portion of my career, the
9 early part of my career, for 18 years I was with
10 PricewaterhouseCoopers or its legacy firms.

11 Q What type of work did you do at
12 PricewaterhouseCoopers?

13 A Well, that's actually, in 1985, where I started doing
14 the work that I do today. So that's where I started
15 initially doing economics and damages work in what I call
16 a dispute environment.

17 Q Have you held any other economics-related positions?

18 A Early in my career after I got my Ph.D., I taught full
19 time at one of the California state university systems
20 schools, Cal State Northridge. I was there full time for
21 two years, '83 to 1985, but even after I joined
22 Pricewaterhouse in 1985, I continued to teach one class a
23 semester at Cal State Northridge for about another seven
24 years. And it's not on here, but I've taught summer
25 classes, about five years worth of summer classes in the

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1 MBA program at SMU as well, Southern Methodist University.

2 Q Are you a member of any professional associations?

3 A Yeah. So there's the American Economic Association,
4 the America Statistical Association, those types of
5 associations, yes.

6 Q Have you published any papers?

7 A Yes, I have a few papers that I've published dealing
8 with sort of economics in a litigation environment.

9 Q Outside of this case, have you ever testified at trial
10 or in a deposition before?

11 A Yes. So, actually, the first time I testified was in
12 1990, and I've testified quite a few times since that over
13 the course of my career.

14 Q What types of cases have you testified in?

15 A I've testified in patent infringement cases, so either
16 in deposition or trial, and that includes -- you know,
17 there's intellectual property, patent infringement,
18 trademark, trade secret type cases, but I've also
19 testified on other causes of action such as security
20 cases, antitrust cases, breach of contract case,
21 professional negligence cases.

22 So really all the different causes of action, anything
23 that requires economic analysis or damages type analysis,
24 I've generally probably testified in those types of cases
25 over the course of my career.

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1 Q How many times have you testified at trial --

2 THE COURT: Do you accept him as an expert?

3 MR. DUSSEAULT: Yes, Your Honor.

4 THE COURT: What area are you qualifying or
5 tendering him in --

6 MR. STRAPP: I would proffer the witness, Your
7 Honor, as an expert in the field of economics and damages
8 quantification.

9 THE COURT: You accept him as such?

10 MR. DUSSEAULT: I do, Your Honor.

11 THE COURT: All right. He's so accepted.

12 Q Have you been retained by the patent owner, ePlus?

13 A Yes.

14 Q And what did ePlus ask you to do?

15 A Well, I was asked to provide guidance to the Court
16 should Lawson be found in contempt of the injunction order
17 as to certain remedies that -- and numbers that the
18 Court -- providing a menu of options to the Court that the
19 Court may choose from as a remedy for that finding if
20 Lawson is found to have violated the injunction order.

21 Q Have you prepared a demonstrative to help you
22 summarize the evidence you reviewed?

23 A Yes.

24 Q And is this the demonstrative you prepared?

25 A It is, yes.

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1 Q What materials did you rely on in forming your
2 opinions in this case?

3 A This is a very high-level listing. As you can see in
4 the footnote there, in my reports I have an Exhibit 3 that
5 lists all the documents that were considered, but there
6 were legal documents, the injunction opinion, the
7 injunction order. There's what I'll call financial and
8 profit and loss and licensing, maintenance, and service
9 revenue related spreadsheets and documents produced by
10 Lawson. There were hearing transcripts, depositions I
11 reviewed. And the opposing expert in this case is named
12 Dr. Putnam, and I reviewed his reports, obviously, as
13 well.

14 Q You mentioned that you reviewed depositions. Did you
15 review the deposition of Kevin Samuelson, the witness
16 Lawson designated as its corporate representative to
17 testify about several financial topics?

18 A Yes.

19 Q Did you review financial spreadsheets that were
20 produced by Lawson?

21 A Yes. So those included like the licensing,
22 maintenance, and service revenue spreadsheets that Lawson
23 produced and also certain profit-and-loss statements that
24 Lawson produced.

25 Q And are the deposition transcripts and the

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1 spreadsheets that you reviewed the type of documentation
2 that experts in your field would find relevant to
3 calculating damages?

4 A Yes. I've been doing this for 27 or 28 years, and
5 those are the types of documents that a financial and
6 economic expert such as myself typically rely upon.

7 Q Did all these materials assist you in formulating the
8 opinions you've rendered in this matter?

9 A Yes.

10 Q Were you asked to make any assumptions?

11 A I was asked to make an assumption, yes.

12 Q And what was that?

13 A The assumption that I was asked to make was that
14 Lawson would be found in contempt of the injunction order.

15 Q Did you come to a conclusion about a specific amount
16 of damages that the Court should award ePlus in the event
17 that Lawson is found in contempt?

18 A I don't know if I would quite phrase it that way. I'd
19 phrase it a little differently in terms of the conclusions
20 that I reached.

21 Q Why wouldn't you phrase it the way I did?

22 THE COURT: Why don't you phrase it the way he
23 would?

24 A The way I would phase it is, my understanding is that
25 the Court has discretion in terms of the options that may

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1 be chosen in terms of a remedy if contempt is found. And
2 so I kind of view it as an if/then statement. If the
3 Court determines that one remedy is a disgorgement of
4 revenues, I've quantified what those revenues are.

5 If the Court determines that one remedy is a
6 disgorgement of gross profits of Lawson during the
7 injunction period, I've quantified what that is. If the
8 Court decides that the appropriate remedy is incremental
9 profits that Lawson earned during the injunction period,
10 then I've quantified that.

11 So I've quantified numbers for the Court to choose
12 from depending on the remedy that the Court chooses.

13 Q Have you prepared a demonstrative to summarize those
14 options?

15 A Yes.

16 Q Is this the demonstrative you prepared?

17 A Yes, it is.

18 Q And I think you just discussed these are the three
19 operations; is that correct?

20 A Yes. So if we look at the title, Measure of Lawson's
21 Gains From Failing to Comply with the Injunction, then on
22 the left-hand side we see measure one, measure two,
23 measure three, and then in the blue, under the heading
24 Gains Associated with Infringing configurations, I've done
25 work to identify Lawson's revenues, Lawson's gross

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1 profits, and Lawson's incremental profits. So that's what
2 I was trying to describe in my prior answer to you.

3 Q I want to turn your attention first to the first
4 measure, Lawson's revenues. Can you describe for me how
5 you identified Lawson's revenues? What was the first step
6 you took?

7 A Well, the first step was to identify the customers
8 that had the infringing configurations.

9 Q And have you prepared a demonstrative to help you
10 explain what you understand to be the infringing
11 configurations?

12 A Yes.

13 Q Is this the demonstrative you prepared?

14 A Yes, it is.

15 Q And can you describe for me what we see on this
16 demonstrative here, please.

17 A Well, on the left-hand side, we have my understanding
18 of what I believe is called configuration number three.
19 On the right-hand side, we have is what is my
20 understanding of configuration number five, that those are
21 the configurations in dispute in this matter for this
22 hearing here, and what I did was was able to identify the
23 number of customers that had configuration number three,
24 which was 72, and the number of customers that had
25 configuration number five, which was 74, for a total of

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1 146 customers.

2 Q How did you identify those customers that you describe
3 as having configurations three and five?

4 A Well, we knew the -- there was some information that
5 we had received where we could match up revenues that were
6 received with various modules, and so that's how we were
7 ultimately able to identify the customers that had each of
8 those configurations.

9 Q Okay. Have you prepared a demonstrative to help you
10 explain how you determined those revenue amounts?

11 A Yes.

12 Q Is this the demonstrative you prepared?

13 A Right. So, again, the title says How Revenue Amounts
14 were Determined, and on the left-hand side, I list three
15 different revenue categories which may have been discussed
16 in court here, but there's something called licensing
17 revenue or license revenue. There's maintenance revenue,
18 and there's service revenue, and through the documents
19 that were produced in this case, I was able to identify
20 those revenues for each of the customers that I talked
21 about previously, the 146.

22 Now, there were a couple of different ways that I did
23 that which we'll get into, but those were the revenue
24 categories that I compiled.

25 Q What is license revenue?

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1 A Just think about that, that's the fee you pay to use
2 the software. That's the easiest way to think about that.

3 Q What is maintenance revenue?

4 A Maintenance revenue, I almost view it like when you
5 get a warranty on your car or you might get a warranty on
6 your appliances, your refrigerator. That's kind of what
7 maintenance revenue is with respect to software. If any
8 bugs come up, that if you paid the maintenance revenue,
9 then that will be taken care of by Lawson.

10 Q What is service revenue?

11 A Service revenue is a little bit different. That's
12 almost like consulting revenue, but it's the installation,
13 it might be implementation, it might be training, it might
14 be consulting. All of that would go into the service
15 revenue bucket, as I call it.

16 Q Did you use the same method to determine all three
17 types of revenue?

18 A Actually, I was able to use the same method for the
19 first two categories, license revenue and maintenance
20 revenue, and I had to use a different methodology for the
21 service revenue.

22 Q Can you describe generally how you measured license
23 revenue and maintenance revenue first?

24 A With respect to license revenue and maintenance
25 revenue, it's almost like a Rosetta Stone aspect where

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1 there's something called stock-keeping units, and so
2 revenue was catalogued according to these abbreviations,
3 in a sense, but we knew the -- and we were able to uncover
4 the stock-keeping units that were associated with
5 different types of revenues for different types of
6 customers.

7 So via these stock-keeping units, we were able to do
8 that matching exercise for the licensing receive and for
9 the maintenance revenue.

10 Q How does Lawson track service revenue?

11 A Service revenue is a little bit different. So with
12 the SKUs for the license revenue and maintenance revenue,
13 there were SKUs that matched up to the modules that are in
14 the infringing configurations. So we were able to
15 directly match those in a sense.

16 However, service revenue at Lawson was compiled on a
17 customer basis rather than a, let's just say a module
18 basis or a configuration basis. So how the data was
19 catalogued was a little different by customer rather than
20 by SKU and module.

21 Q We'll turn in a few minutes to how you specifically
22 calculated revenue, but first, could you please explain
23 for the Court why you've provided revenues as one option
24 for the Court to consider?

25 A It was a couple of different reasons why I provided

1 revenue. It's almost a choice and a reference point. So
2 my understanding that one remedy could be a discussion --
3 a disgorgement of the revenues earned during the
4 injunction period if contempt is found, so I've provided
5 that number for the Court's consideration.

6 But also, it just helps, from a reference point of
7 view, to know the magnitude of the revenues that we're
8 talking about, and ultimately, when you get down to
9 looking at different profitability measures such as gross
10 profits or incremental profits, you have to start out with
11 a revenue.

12 You take revenues, subtract certain costs, and you get
13 certain profitability measures. So it's both a choice but
14 also a reference point here. So I think it's useful
15 information to present to the Court.

16 Q What was the time period for which you calculated
17 revenues?

18 A So that would be -- obviously, it's a little
19 complicated, but it's over what I'll call the injunction
20 period. Now, there's different dates, but it's over the
21 injunction period.

22 Q Have you prepared a demonstrative to help you explain
23 how you define the injunction period?

24 A Yes.

25 Q Is this the demonstrative you prepared?

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1 A Yes.

2 Q Can you explain what the relevant time period is that
3 you looked at?

4 A So we have a timeline here, and I'm just going to
5 point out three dates. There's the May 23rd, 2011, date,
6 the November 23rd, 2011, date, and November 30th, 2012,
7 date. So the easiest way to think about this is, the
8 entire injunction period for which we have data is
9 May 23rd, 2011, through November 30th, 2012, and for
10 non-designated health care customers, in other words,
11 other customers, we compiled the license, maintenance, and
12 service revenues over that entire time period.

13 With respect to the designated health care customers,
14 we compiled the maintenance and service revenues after the
15 sunset period from November 23rd, 2011, to November 30th,
16 2012, and then finally, for the designated health care
17 customers, we compiled the licensing revenue over the
18 entire time period.

19 Q And can you explain the significance of November 30th,
20 2012, which appears as the last date on your timeline?

21 A That would be the last point in time, the last date
22 for which Lawson provided data. So that's not sort of the
23 end of the injunction period. It's dictated by the end of
24 the data that was provided by Lawson.

25 Q All right. Let's turn to license and maintenance

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1 revenues.

2 THE COURT: I don't understand why the revenues
3 for designated health care customers under the maintenance
4 and service is one period and the designated health care
5 customers revenue for licenses is another period. Why is
6 that so?

7 MR. STRAPP: Your Honor, if you --

8 THE COURT: I was asking the witness.

9 MR. STRAPP: I'm sorry.

10 THE COURT: Why did you choose that?

11 MR. DUSSEAULT: I was just going to say, I'd
12 certainly prefer to have the witness testify to that than
13 counsel.

14 THE COURT: You don't want to cross-examine him?

15 MR. DUSSEAULT: Withdrawn.

16 THE WITNESS: My understanding of the Court's
17 order was that there was a sunset period, and during that
18 sunset period, the software that the designated health
19 care customers had could be maintained and allowed for a
20 transition period. And so that sunset period was six
21 months, and when that sunset period ended, so that's when
22 we start picking up the maintenance and service. So that
23 explains the top part of the chart.

24 And I think what you are really asking me is the
25 bottom part of the chart is why are we picking up license

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1 revenue over the entire time period, and my understanding
2 for the injunction order is that there, in a sense, could
3 be no new licensing by these customers. It would just be
4 sort of a maintenance mode during the sunset period.

5 So that's why there's license revenue over the
6 entire time period, and the maintenance and service is
7 after the sunset period.

8 THE COURT: All right.

9 Q Now, Dr. Ugone, you testified that license and
10 maintenance revenues are associated with SKU data that's
11 provided by Lawson; is that correct?

12 A Yes.

13 Q How did you determine which SKUs or stock-keeping
14 units were associated with the various software modules
15 included in configurations three and five?

16 A That's -- I've been referring to it as a Rosetta
17 Stone, but we had a document that was able to match up
18 SKUs with the modules in the infringing configurations.

19 Q Could you please turn in your binder to PX-1078.

20 A (Witness complied.)

21 Q Dr. Ugone, are you familiar with this exhibit?

22 A Yes, I am.

23 Q And what is this document?

24 A This was an exhibit to Mr. Samuelson's deposition, and
25 this is what I was talking about in a sense of, as I use

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1 that term Rosetta Stone, but on the left-hand side, you
2 can see in this exhibit --

3 THE COURT: Excuse me. Which one are we doing?

4 THE CLERK: 1078, Your Honor. 1078.

5 THE COURT: I'm sorry. Go ahead.

6 A So in Plaintiff Exhibit 1078, we have a one-page
7 document which is from Mr. Samuelson's deposition. On the
8 left-hand side, the left-hand column, we basically have
9 the modules that are in the infringing configurations.

10 In the next two columns, and primarily the right-hand
11 column, we have what are called SKUs or stock-keeping
12 units. So to the extent that revenue was compiled in the
13 Lawson revenue spreadsheets by SKU, we were able to use
14 this mapping to tell us, okay, if we saw certain letters,
15 what modules did those letters go along with, and so
16 that's what this document helps us do.

17 Q Was this document created by you?

18 A No. This was a Lawson document.

19 MR. STRAPP: Your Honor, I would proffer PX-1078
20 into evidence.

21 THE COURT: Any objection?

22 MR. DUSSEAUT: No, Your Honor.

23 THE COURT: It's admitted.

24

25 (ePlus Exhibit 1078 admitted.)

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1 Q Have you prepared a demonstrative to help you explain
2 the significance of the SKUs?

3 A Yes.

4 Q And let's turn to this demonstrative you prepared.
5 Can you explain to me what it is?

6 A Yes. So remember what I said very early on, we use
7 the SKUs to help us identify licensing and maintenance
8 revenues. We had to use a different technique for the
9 service revenues.

10 So the title of this chart is called Identification of
11 Licensing and Maintenance Revenues. We happen to be
12 showing configuration number five here on the left-hand
13 side, and if we temporarily just ignore the blue box, S3
14 procurement modules, if we just take that out of the
15 picture for a second, you can see for each box or each
16 module, in a sense, the corresponding SKUs. That's what
17 we're trying to communicate.

18 So if I wanted to add together all of the, say,
19 licensing revenues, or separately all of the maintenance
20 revenues associated with configuration five, and I'm going
21 to come back to the blue box in a second, we would add
22 together -- based on Plaintiff's Exhibit 1078, we'd add
23 together the revenues that are in the SKUs that we have on
24 the right-hand side of the chart that's in front of us.

25 Q You said that the S3 procurement modules you treated

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1 differently. Why was that?

2 A Well, because there was some different categories of
3 how the data was compiled. It still used SKUs, but it was
4 a little bit different compilation of the SKUs and what
5 was combined in each of the SKUs.

6 Q Have you prepared a demonstrative to help you explain
7 how you calculated license and maintenance revenues for
8 the S3 procurement modules?

9 A Yes.

10 Q And is this the demonstrative you prepared?

11 A Yes, it is.

12 Q What are the three ways the S3 procurement modules
13 show up in license and maintenance revenues?

14 A Well, as you see in the blue box there, S3 procurement
15 modules, there's purchase order, requisitions, and
16 inventory control. So when you look at how Lawson
17 compiled the revenue data, sometimes they would put that
18 revenue into an IC bucket, a PO bucket, or an RQ bucket.

19 Those are SKUs, so those are pretty straightforward.
20 That's just inventory control, purchase order, and
21 requisitions. So that was just a straightforward way of
22 figuring out what those revenues were. But there's other
23 times, depending on how the customer would pay, they would
24 compile the information differently. So there was another
25 SKU called proc, p-r-o-c, which was a combination of IC

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1 plus PO plus RQ. So it wasn't shown individually. It was
2 shown compiled into one number. But, again, that was
3 relatively straightforward, so we took 100 percent of that
4 number.

5 Now, where required, some data compilation and
6 manipulation on our part was that sometimes there would be
7 a suite of modules where the customer would buy the suite
8 of modules that would include purchase order,
9 requisitions, and inventory control, but it might include
10 other modules as well.

11 So that's called the large suite SKUs, and that would
12 include, like I said, those three modules, but it might
13 include others. So we had to do an apportionment
14 approach, and at the end of the day, we would take
15 35 percent of the large suite revenues for the blue box,
16 as I describe it.

17 Q How was the 35 percent apportionment for the large
18 suite SKUs determined?

19 A Ultimately, it ended up being pretty straightforward,
20 that when you looked at the pricing associated with
21 ThinPro, for example, and you compared that to the pricing
22 of the three modules that we're interested in for the
23 infringing configuration here, the purchase order,
24 requisitions, and inventory control, the price of the
25 three sort of S3 procurement modules relative to the price

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1 of the large suite ultimately, after some calculations, we
2 determined was about 35 percent. So we took 35 percent of
3 those revenues.

4 Q Did you also apportion the revenue recorded under the
5 SKUs besides the large suite SKUs?

6 A No, because those were all just entirely part of the
7 infringing configurations.

8 Q Were you able to determine Lawson's service revenue
9 for the infringing configurations three and five using the
10 same method that you used for license and maintenance?

11 A No, we were not able to do it the same way, because
12 Lawson did not service by SKUs. So we didn't have the
13 same mapping that we've been talking about for the last
14 couple of minutes. We would have service revenue by
15 customer, not service revenue by SKU.

16 Q Well, could you just include all the service revenue
17 associated with the 146 customers that had configurations
18 three and five?

19 A Well, I wouldn't want to do that, because if they had
20 more software modules from Lawson than just the infringing
21 configurations, then you'd be overstating the service
22 revenue, so we did not take that approach.

23 Q Have you prepared a demonstrative to help explain how
24 you apportion service revenues?

25 A Yes.

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1 Q Is this the demonstrative you've prepared?

2 A Right. So at the top it's called Apportionment of
3 Service Revenues, correct.

4 Q How did you determine to apportion service revenues?

5 A Again, this ended up being a relatively
6 straightforward calculation. We used maintenance revenues
7 as a proxy. So what we said was, once we know our 146
8 customers, let's see the total that they pay in
9 maintenance revenues. And we also happen to know the SKUs
10 associated with the infringing configurations, so let's
11 figure out the maintenance revenues that are paid related
12 to the infringing configurations.

13 Once we have the maintenance revenue associated with
14 the infringing configurations, and once we have the total
15 maintenance revenue, we can just take the ratio of the two
16 and apply that to service revenues. So roughly speaking,
17 As the chart shows here, when you look at all the
18 customers, Lawson customers with the infringing
19 configurations, about 20 percent of their maintenance
20 revenues in total that were paid were associated with the
21 infringing configurations.

22 We used that 20 percent and applied it to the service
23 revenues. So that dictated how much of the service
24 revenues we used in my calculations.

25 Q Did you apply that 20 percent apportionment to Lawson

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1 service revenues?

2 A Yes. So that's what this is trying to show here. We
3 did the calculation for maintenance revenues, we used that
4 as a proxy for service revenues, and we applied it to
5 service revenues.

6 Q Were you able to calculate the revenues that Lawson
7 earned from configurations three and five after the
8 effective dates of the injunction order?

9 A Yes. I'm sorry. After the effective dates, no. We
10 did the calculation during the injunction period, but as I
11 mentioned previously, the data ended as of November 30th,
12 2012, so we don't have the data past that.

13 Q Between the period of the injunction, effective date
14 of the injunction and November 30th, 2012, were you able
15 to calculation the revenues associated with configurations
16 three and five?

17 A Yes.

18 Q And have you prepared a demonstrative to show the
19 results of those calculations?

20 A Yes.

21 Q Is this the demonstrative you prepared?

22 A Yes, it is.

23 Q And what does this show?

24 A So, again, it's entitled Lawson's Infringing Revenues,
25 so these are the revenues associated with the infringing

1 configurations during the injunction period up until
2 November 30th, 2012, and we've broken it out by license
3 revenues, maintenance revenues, and service revenues.

4 So on the right-hand side, we see that license
5 revenues over the injunction period, as I've defined it
6 according to the Court's order, was \$7.1 million,
7 maintenance revenues were \$12.7 million during that time
8 period, and service revenues as I have described are
9 \$9.6 million over that injunction period for a total of
10 \$29.4 million.

11 Q Do the revenue calculations that are shown on this
12 demonstrative account for the 35 percent apportionment
13 that you discussed for large suite SKUs?

14 A Yes.

15 Q And do the revenue calculations shown on this
16 demonstrative also account for the 20 percent
17 apportionment for service revenues that you discussed?

18 A That's correct, yes. So all of that is embedded in
19 these numbers. So we've done the appropriate calculations
20 and subtracted out the appropriate amounts.

21 Q Let's turn now to profits. Did you review information
22 from Lawson specifically about the profitability of the
23 infringing configurations?

24 A Not with respect to the infringing configurations
25 specifically. That data was not available.

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1 Q Why not?

2 A Lawson does not track profitability by product or by
3 module or by those infringing configurations.

4 Q So what profitability data were you able to review
5 that Lawson provided?

6 A Lawson did provide, for example, their profit-and-loss
7 statements. So I've seen those for a number of different
8 years.

9 Q Is there, in your opinion, any way to estimate the
10 profitability associated with configurations three and
11 five?

12 A Well, if you are very careful in terms of making sure
13 you are capturing the right costs and understand the right
14 relationships, and if you use a series of assumptions, and
15 as long as they are appropriate assumptions, you can make
16 some estimates of the profitabilities associated with the
17 infringing configurations at those revenues that we've
18 identified, the \$29.4 million.

19 Q Are there different types of profits that can be
20 calculated for Lawson?

21 A Yes.

22 Q Could you give me a few examples?

23 A This is -- especially to an economist, you always have
24 to be careful when you say the term profits, because an
25 economist is always going to look for an adjective in

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1 front of profits, a descriptor, because there's many
2 different types of profits. So one could talk about gross
3 profits, one could talk about incremental profits, one
4 could talk about net profits, and those are all very
5 different types of profits. So it's always important to
6 have the word in front of profits, but those are examples
7 of profits.

8 Q And what are gross profits?

9 A The easiest way to describe gross profits, I always
10 think about -- you know, if you think about a
11 manufacturing facility, and if they're making widgets or
12 maybe they're making ballpoint pens. So you might take
13 the revenues, minus the material cost and the labor cost
14 to make either the widgets or the pens.

15 When you do that subtraction of what I'll call direct
16 costs, that gives you what's called gross profits. That's
17 the easiest way to think about that, just some -- in a
18 factory, that would be the material and the labor.

19 Now, when you get to things like software, it's a
20 little bit different, but the concept is the same, those
21 direct costs associated with those revenues.

22 Q What are incremental profits?

23 A Incremental profits, you're not going find these on
24 the financial statements. They're more difficult to
25 calculate, but the easiest way to think about incremental

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1 profit is, if I sell one more unit, or maybe if I get one
2 more dollar of revenue, what's the profitability
3 associated with that incremental unit I've sold or that
4 incremental dollar of revenue that I've taken in.

5 And that would go beyond just those direct costs that
6 I talked about, because there might be other costs within
7 a company that may vary as sales vary. So that's what
8 you're trying to capture. Any other incremental or
9 variable costs, you take those away from the gross
10 profits, and you'll get what's called incremental profits.

11 Q And I think the last example you mentioned are net
12 profits. Can you explain what net profits are?

13 A Without getting too technical about it, the way I
14 think about net profits, the easiest way to describe it is
15 basically subtracting out all the costs. So there might
16 be the direct costs, there could be these variable costs,
17 but there could be a whole series of what's called fixed
18 costs, costs -- you know, the accounting department, or it
19 could be the information technology group, or it to be
20 Human Resources.

21 Those are all examples of costs that may not vary as
22 you sell more units, but when you are looking at net
23 profits, you are subtracting out all of those what are
24 called fixed costs as well, and, remember -- I'm throwing
25 out a whole bunch of terms here, but there's variable

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1 costs, costs that vary as you produce more. There's fixed
2 costs that are relatively constant as you produce more.

3 But all of those are subtracted out to get to net profits.

4 Q Have you attempted to calculate profits that Lawson
5 made from licensing, maintaining, and servicing
6 configurations three and five during the injunction
7 period?

8 A Yes.

9 Q Have you calculated gross profits?

10 A Yes, I have.

11 Q And have you calculated incremental profits?

12 A Yes.

13 Q And have you also offered a calculation for net
14 profits?

15 A No.

16 Q Have you prepared a demonstrative to help you explain
17 why you didn't calculate net profits?

18 A I do have a demonstrative on that, yes.

19 Q Is this the demonstrative you prepared?

20 A Yes.

21 Q And do you have an opinion about whether or not the
22 calculation of net profits is appropriate in this case?

23 A I do, and you can look at the top of the chart. It
24 says, net profit margin is inappropriate for measuring
25 Lawson's gains, and I give just some examples of why I

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1 hold that opinion.

2 Q Can you provide us with your understanding of why you
3 believe that net profits are inappropriate in this case.

4 A Remember what I said when we were talking about net
5 profits, we're subtracting out all the costs in a sense.
6 So we're subtracting out the direct costs and what are
7 even called operating expenses.

8 So those operating expenses might include general and
9 administrative costs, and we'll give some examples of that
10 in a second. Some product development or research and
11 development costs, it would include sales and marketing
12 costs. So when you're talking about net profits, you are
13 subtracting all of those out.

14 Now, when we're talking about the injunction period,
15 what we're saying is, what costs would have varied in that
16 injunction period; in other words, if I want to understand
17 the gains to Lawson during the injunction period, I'd be
18 subtracting out the costs from revenues but those costs
19 that would vary with revenues. I wouldn't subtract out
20 the fixed costs, because when I'm subtracting out the
21 fixed costs, then you're subtracting out too many costs.

22 THE COURT: Subtracting out what?

23 THE WITNESS: Too many costs. You're subtracting
24 out costs that would not vary with a change in the
25 revenues associated with the infringing configurations.

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1 This is all exciting stuff to an economist. I apologize.

2 Q Do you have any other reasons for your opinion that in
3 this case it was inappropriate to calculate net profits?

4 A Well, also there's been testimony by Mr. Samuelson
5 that these costs are not directly related to the
6 infringing configurations, and if they're not directly
7 related, they shouldn't be subtracted out. If you ended
8 up subtracting them out, you'd result in a windfall gain
9 to Lawson.

10 Q And can you explain why, in your opinion, it's wrong
11 to deduct fixed costs when attempting to calculate the
12 profits that Lawson gained from the infringing
13 configurations?

14 A Well, that's where you'd end up with a windfall gain
15 to Lawson, because you'd be subtracting out too many
16 costs, leaving too little profit associated with the
17 provision of those infringing configurations. So that's
18 why you would not subtract out those fixed costs.

19 THE COURT: That presupposes that you know why
20 it's too many costs.

21 THE WITNESS: Yes, and we'll get into some detail
22 on that, so, yes.

23 Q Could you turn to PX-1244 in your binder, please.

24 A I'm there.

25 Q Are you familiar with this exhibit?

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1 A Yes.

2 Q What does it show?

3 A This is -- if you look up in the upper left-hand
4 corner, you'll see some information. So this is a
5 profit-and-loss statement for Lawson for fiscal year 2012,
6 and it's for the United States, and then you'll see what I
7 call left labels on the left-hand side that give different
8 line items, and then sort of in the middle of the chart
9 you'll also see some numbers. So basically a profit and
10 loss statement.

11 Q Is this information specific to configurations three
12 and five?

13 A No. This is for all of Lawson, the entire company,
14 the U.S.

15 Q If you look at the right side of the first page of the
16 spreadsheet, do you see that there are some columns with
17 Xs underneath them?

18 A Yes.

19 Q What do those mean?

20 A Well, the easiest to do that is, is the Xs tell you
21 where to place the line items if you wanted to divide up
22 these revenues into different buckets like licensing,
23 maintenance, or service revenues.

24 So, for example, we could -- if you look at -- and
25 hopefully everybody has a color copy of this, but if you

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1 look at the left labels on the left-hand side in the blue
2 section, it says, new software license. If you go all the
3 way over to the right where it says allocation method,
4 you'll see that there's an X under license.

5 So what Lawson is telling us is, is that new software
6 license goes into the license bucket in terms of what they
7 would catalog as licensing revenue.

8 Q And how do you know that your interpretation of this
9 Lawson spreadsheet is correct?

10 A This was described in Mr. Samuelson's deposition.

11 MR. STRAPP: Your Honor, I would offer PX-1244
12 into evidence.

13 THE COURT: Any objection?

14 MR. DUSSEAULT: No, Your Honor.

15 THE COURT: It's admitted.

16

17 (ePlus Exhibit 1244 admitted.)

18

19 Q I'd like to turn to your gross profits calculation.
20 You mentioned that gross profits are calculated by
21 subtracting direct costs from revenue.

22 A Yes.

23 Q How do you know, in this case, which costs to
24 subtract?

25 A If I understand your question, that would be from this

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1 exhibit we just looked at. So, for example, I gave you an
2 example of how one would know the licensing revenue using
3 the left labels and the Xs -- left labels on the left and
4 the Xs on the right, but, for example, if we take another
5 example where it says midway down, cost of licenses, if
6 you just follow that line item all the way across, you'll
7 see an X under license. So now I know the associated
8 direct costs that go along with the license revenue.

9 So from this spreadsheet, we will -- we were able to,
10 in a sense, reorganize it based on the Xs to come up with
11 gross profit margins.

12 Q Have you prepared a demonstrative to help explain in
13 this case what direct cost you subtracted from revenues to
14 calculate gross profits?

15 A Yes.

16 Q And is this the demonstrative you prepared?

17 A Yes. So we can see the title again, Expenses Deducted
18 to Derive Gross Profits, and there's the direct cost of
19 licensing, the direct costs of maintenance, and the direct
20 costs of service, and this is based on deposition
21 testimony again of Mr. Samuelson.

22 What are the different conceptual cost categories that
23 are part of the direct costs of licensing, direct costs of
24 maintenance, and direct costs of service. So we've listed
25 out examples of those direct costs.

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1 Q And could you give me some examples that you deducted
2 from revenues to calculate gross profits?

3 A So, for example, under direct costs of licensing,
4 there might be royalties paid to third-party technology
5 partners or commissions paid to resellers, cost of
6 hardware infrastructure use for hosting the software.
7 That would all be costs associated with the licensing
8 revenues that Lawson has received.

9 Similarly, if we go to the direct costs of
10 maintenance, there's the internal support group costs.
11 That's the first line item there. All the way down to the
12 last one in that column, commissions paid to Lawson
13 salespeople, those are all the things that were testified
14 to by Mr. Samuelson.

15 The direct costs of service, there's internal
16 consulting personnel, there might be third-party
17 consulting expenses, commissions, bonus, travel expenses
18 because you are doing consulting and going on site to the
19 -- potentially to the customer site. So those are the
20 types of things you would subtract out of the service
21 revenue as direct costs of providing that service.

22 So this conceptually tells us what are the costs, the
23 different buckets or categories of costs associated with
24 each of the revenues.

25 Q And, again, this was from the spreadsheet that we just

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1 looked at?

2 A These are from the spreadsheet but also in combination
3 with Mr. Samuelson's deposition testimony.

4 Q Has Lawson provided ePlus with data regarding gross
5 margins for licensing, maintenance, and service?

6 A On a companywide basis, yes. So that was from a
7 document that we've seen.

8 Q Okay. And have you prepared a demonstrative to show
9 the gross profits that Lawson received in your calculation
10 from licensing, maintaining, and servicing configurations
11 three and five?

12 A Yes. I've prepared a chart, yes.

13 Q Is this the demonstrative you prepared?

14 A Yes.

15 Q Can you explain what this shows, please?

16 A So, again, I try to entitle my charts such that
17 they're descriptive, but it says Lawson's Infringing Gross
18 Profits. We talked at first how I compiled the infringing
19 revenues which was \$29.4 million. We've just talked about
20 the direct costs of licensing, maintenance, and service,
21 and those direct costs are approximately 11.3 million.

22 We subtract the direct costs from the revenues in
23 dispute, the infringing revenues, and you get what's
24 called gross profits which is \$18.1 million.

25 Q Let's turn to incremental profits. Does Lawson track

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1 incremental profits?

2 A No.

3 Q Did you attempt to estimate Lawson's incremental
4 profits for configurations three and five?

5 A I did, yes.

6 Q Have you prepared a demonstrative to help you explain
7 how you calculated Lawson's incremental profit?

8 A I did prepare some additional charts, yes.

9 Q Let's take a look at your demonstrative. Is this the
10 demonstrative you prepared?

11 A I did prepare this demonstrative, yes. This one is
12 going to the bottom line in terms of the results of my
13 work.

14 Q What costs did you consider deducting to calculate an
15 incremental profit margin?

16 A The way to think about it is, again, we have revenues
17 less direct costs give gross profits. The question is,
18 are there any other costs to deduct, and those costs that
19 you can consider would be operating expenses. And we've
20 provided three different categories of operating expenses
21 here which are general and administrative, product
22 development, which is the same as R and D, research and
23 development, and also sales and marketing. Below each of
24 those, based on the deposition testimony of Mr. Samuelson,
25 we've tried to conceptually say, what are in each of those

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1 operating expenses buckets.

2 Q How does Lawson track these types of operating
3 expenses?

4 A Well, they did not track them on a product-by-product
5 basis if that's what you're asking, so they all went into
6 one compilation.

7 Q Have you prepared a demonstrative to help you explain
8 which of these costs could and which could not be used to
9 estimate incremental profits?

10 A Yes.

11 Q Is this the demonstrative you prepared?

12 A Yes. So this -- in a sense, if you keep in mind the
13 prior chart that lists out the three different types of
14 operating expenses and also keep in mind the buckets of
15 costs that are within each of those categories of general
16 and administrative, product development, and sales and
17 marketing, this chart shows my ultimate conclusions of the
18 which ones I would deduct to come up with incremental
19 profits and which ones I would not deduct because they are
20 fixed costs. That's what this chart is telling us.

21 Q Can you explain which costs -- well, let's start with
22 the G&A cost on this demonstrative. Can you explain why
23 it's your opinion that you would not deduct G&A costs to
24 calculate incremental profits?

25 A Well, when we're talking about general and

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1 administrative costs, we're talking about the finance
2 department, we're talking about the information
3 technology, IT group, we're talking about HR. Those are
4 all the things that were on the prior chart, and if you
5 think about it, those are not the types of costs that
6 would vary with revenue associated with the infringing
7 configurations during the injunction period.

8 THE COURT: They're going to be there anyway.

9 THE WITNESS: They're going to be there anyway,
10 yes.

11 Q Was there any documentation you relied on to come to
12 that conclusion?

13 A Actually, there was deposition testimony that I relied
14 upon.

15 Q What about financial information produced by Lawson?

16 A I also looked at their 10Ks, and in their 10Ks they
17 would often describe movements in general and
18 administrative costs or other costs, and they would give
19 other reasons other than revenue. In other words, these
20 were varying for -- there was a merger or there was a
21 change in compensation, or they've done something else,
22 but it wasn't because of sales increasing, and, clearly,
23 these were stay fixed. They wouldn't change with the
24 infringing configuration revenues.

25 Q What about product development costs; can you explain

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1 why you didn't deduct product development costs to
2 calculate incremental profits?

3 A Same concept there. They wouldn't change whether you
4 are providing the infringing configurations or not, and,
5 in fact, there was deposition testimony that there was
6 no -- in other words, I've seen no evidence of any product
7 development expenses associated with the infringing
8 configurations.

9 So I think it's important to remember here, we're not
10 just even talking about changes in Lawson's revenue
11 generally. We're talking about the infringing
12 configurations, was there any product development expenses
13 incurred associated with the infringing configurations
14 during the injunction period, and I've seen no evidence of
15 that, and, hence, that's why there's a no in this bucket
16 here of product development, why it is not subtracted out
17 as a cost.

18 Q So is it your opinion that when you calculate an
19 incremental profit margin, you can never deduct product
20 development costs?

21 A So with G&A, for example, and with product
22 development, I'm not saying that it's never appropriate to
23 deduct that. I'm saying given the facts and circumstances
24 of what's going on in this dispute, looking at the
25 infringing configurations and those revenues during the

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1 injunction period, if those revenues were taken away,
2 would these costs have declined and/or changed, and
3 there's been no evidence of that.

4 Q What about sales and marketing expenses? Can you
5 explain why you deducted sales and marketing expenses in
6 calculating incremental profits here?

7 A So I have a yes here, so I ended up some doing some
8 deductions which we'll explain in a second, but there were
9 categories here that one would think would vary with
10 revenue, for example, commissions. And because of that, I
11 made the determination that I would do some deductions for
12 those costs.

13 Q Well, under this reasoning, is it appropriate to
14 deduct all sales and marketing expenses? Was that your
15 ultimate opinion?

16 A Well, what I ended doing for conservatism, I did
17 subtract all sales and marketing expenses. It's highly
18 unlikely that all of them would be variable related to the
19 infringing configurations during the injunction period,
20 but for conservatism, on a percentage basis I subtracted
21 out all of the sales and marketing expenses.

22 Q Have you prepared a demonstrative to help you explain
23 what Lawson's incremental profit margin on figure
24 configurations three and five was if you adopt this
25 approach?

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1 A Yes.

2 Q And is this the demonstrative you prepared?

3 A Yes, it is.

4 Q Can you explain what it shows?

5 A This really is pulling everything together that we've
6 talked about. If you look at revenue, and let's just call
7 that 100 percent, that's the -- for example, the
8 \$29.4 million, subtract out the direct costs, which are
9 about 33.9 percent, yields a gross profit margin of about
10 66.1 percent.

11 We then subtract out on a percentage basis all of the
12 sales and marketing expenses for conservatism. That's
13 another 15.2 percent, and you end up with an incremental
14 profit margin of 50.9 percent.

15 So the thing I'll point out here is, we talked about
16 the revenues first, the 29.4 million, and we'll see this
17 in a summary chart. Then we talked about gross profits,
18 and now we're taking it down to incremental profits.

19 Q And have you also prepared a demonstrative to help you
20 explain in dollar figures what you calculated Lawson's
21 incremental profits to be?

22 A Yes.

23 Q Is this the demonstrative you prepared?

24 A Yes, it is.

25 Q What does this show?

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1 A So there were infringing revenues of 29.4 million
2 compiled according to that methodology I talked about
3 earlier. I've talked about how I have derived an
4 incremental profit margin of 50.9 percent. You multiple
5 that incremental profit margin of 50.9 percent times the
6 \$29.4 million of infringing revenues associated with the
7 infringing configurations during the injunction period,
8 and you get incremental profits to Lawson of \$15 million.

9 Q You have reviewed a few different measures of damages
10 during the injunction period through the end of
11 November 2012. Have you prepared a demonstrative to
12 summarize the different opinions you've provided?

13 A Yes.

14 Q Is this the demonstrative you've prepared?

15 A Yes. So this is actually taking us full circle to the
16 very beginning where I talked about the different measures
17 that I was providing for the Court's consideration,
18 measure one, measure two, and measure three, and so we see
19 here, as its entitled, Summary Disgorgement Damages, and
20 that would be basically from the injunction through
21 November 30th, 2012. That's important. And then I give
22 the quantification of each of those concepts.

23 So Lawson's revenues were \$29.4 million; Lawson's
24 gross profits during this period of time, \$18.1 million;
25 and Lawson's incremental profits were \$15 million, and,

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1 again, this is all associated with the infringing
2 configurations during the injunction period up through
3 November 30th, 2012.

4 Q Do you have an opinion about how to quantify damages
5 after November 30th, 2012, should the Court find Lawson in
6 contempt?

7 A There's really two different ways that that could be
8 done. It could be that after the Court's finding, that
9 Lawson provides updated data in which case I would just
10 follow this same methodology for the data that goes from
11 December 1st, 2012, through, let's say, today, or what
12 I've also done and provided here is what I'll call a daily
13 rate.

14 So for each of these disgorgement measures, I've
15 calculated what it is on a daily basis, and so the Court
16 could take that daily rate and then multiple by the number
17 of days.

18 Q Have you provided any damages options for the Court to
19 consider if Lawson does not comply with the Court's order
20 should the Court find Lawson in contempt?

21 A Right. So like I said, there's a daily rate. Now,
22 what the daily rate can do is from the history, the number
23 of days from November 30th, 2012, through today, you can
24 use that daily rate, but on a going-forward basis, in a
25 sense that could be a rate that the Court could apply, in

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1 a sense, as a penalty for each day that Lawson does not
2 comply with the injunction order. So you could use the
3 same numbers but for different purposes.

4 Q Have you prepared a demonstrative to summarize these
5 daily measures?

6 A Yes.

7 Q Is this the demonstrative you've prepared?

8 A Yes, it is.

9 Q And what does it show?

10 A So daily rates, and I've got my three measures again,
11 daily revenues, daily gross profits, daily incremental
12 profits. That's what's shown on the right, so each day in
13 the past up through today, or you could use that as a
14 course of payment in the future if Lawson does not comply,
15 the daily revenues associated with the infringing
16 configurations, on average, are \$62,362; daily gross
17 profits, \$38,928; and the daily incremental profits,
18 \$31,742.

19 MR. STRAPP: No further questions.

20 THE COURT: Are these disks and all these
21 documents in here, are they all agreed?

22 MR. STRAPP: Your Honor --

23 THE COURT: Are they part of what you gave me as
24 agreed exhibits early on?

25 MR. STRAPP: Exactly. These are actually DVDs of

1 large financial spreadsheets. If you get bored this
2 weekend, they're there for you.

3 THE COURT: I'm a Louisville supporter. I don't
4 think I'm going to get bored this weekend.

5 MR. DUSSEAULT: That hurt, Your Honor.

6 THE COURT: Only when Kentucky is not in the
7 tournament.

8 MR. DUSSEAULT: May I proceed?

9 THE COURT: Please.

10

11 CROSS-EXAMINATION

12 BY MR. DUSSEAULT:

13 Q Good afternoon, Dr. Ugone.

14 A Good afternoon.

15 Q You mentioned early in your testimony that your
16 assignment or role here was to provide guidance to the
17 Court; correct?

18 A Yes.

19 Q And you recognize that the Court has broad discretion
20 in awarding a remedy in a contempt proceeding; correct?

21 A That's my understanding, yes.

22 Q And you also recognize that the Court exercises that
23 discretion only after considering the relevant facts and
24 circumstances; correct?

25 A I would agree with that, yes.

1 Q You also described to the Judge that the way you
2 evaluate this is sort of an if/then statement; correct?

3 A Yes.

4 Q Meaning if the Court finds a particular remedy to be
5 appropriate, then you play your role of calculator and you
6 calculate that; right?

7 A It's a little bit more than that, but I'll accept the
8 -- in the spirit of your question, I will accept that,
9 yes.

10 Q I appreciate that, thanks. The only measure of
11 damages you've offered today with Mr. Strapp are
12 disgorgement of profits and revenues; correct?

13 A I have just provided disgorgement of revenues,
14 disgorgement of gross profits, and disgorgement of
15 incremental profits.

16 Q Take your if/then construct with me, if you would,
17 sir. If the Court decides in his broad discretion after
18 hearing all the evidence that it wants to award a remedy
19 other than disgorgement, then you've given the Court
20 nothing it can use; true?

21 THE COURT: Then what?

22 Q Then you've given the Court nothing at all it can use;
23 correct?

24 A I would be a little careful with that. At the bottom
25 line, yes, I've provided three measures to the Court, but

1 there's valuable information in the data that I've
2 provided to the Court, and the Court can take that
3 information and use it how they want. But in terms of
4 bottom lines measures, I'm not going to disagree. I've
5 provided three measures for the Court.

6 Q Okay, and just to be sure I didn't overstate, let's
7 clarify that. You've offered three measures, but every
8 one of the measures is a disgorgement of either revenues
9 or profits; true?

10 A I believe I would agree with that, yes.

11 Q Let's look at your calculator role. If the judge
12 decides it wants -- that he would like to award a remedy
13 anywhere out in the universe other than disgorgement,
14 taking your calculator role, you have not calculated an
15 award that he can give here; correct? That's true, isn't
16 it, sir?

17 A What I was trying to say is I would agree with the
18 spirit of your question, but there's a lot of numbers I
19 presented to the Court. The Court can choose to use those
20 numbers as they wish, because it's various categories, but
21 in terms of the bottom line numbers I've provided, yes,
22 there's three disgorgement measures.

23 Q Okay. And you were asked by Mr. Strapp about any
24 assumptions you've made. Do you recall that?

25 A Yes.

1 Q And you only identified one assumption which was that
2 the Court finds Lawson to be in contempt; correct?

3 A Yes, and -- the answer is yes, and the reason why I
4 did that is that's usually the primary assumption that a
5 damage quantifier makes. Otherwise, the numbers aren't
6 relevant.

7 Q But that isn't really the only assumption you made, is
8 it?

9 A Well, I tried to have empirical anchors and inputs for
10 other -- the bases for the calculations. Now, whether we
11 call them inputs or assumptions, but there was data I was
12 using. There was deposition testimony.

13 Q But, in fact, sir, you relied on a representation from
14 ePlus's lawyers that disgorgement is an appropriate remedy
15 in this proceeding; you relied on that, correct?

16 A I would agree with that, yes.

17 Q And you can't --

18 A I'm sorry. If I could add a little bit. And also,
19 I've seen that before in some of the other work that I've
20 done. So it was not like that assumption seemed out of
21 the ordinary. It seemed to make sense, but you are right,
22 I'm not a lawyer, so I can't make that determination
23 myself.

24 Q Right, and we'll talk a little bit about some of the
25 other work you've done. You say you -- strike that.

1 It's true that you can't speak to whether disgorgement
2 is always an appropriate remedy, can you?

3 A I put that into more of what I'll call the legal
4 bucket rather than the economic bucket, so I can't -- nor
5 would I attempt to speak to that.

6 Q So is the answer yes?

7 THE COURT: I think a good answer to that is, no,
8 I can't speak to that.

9 A I cannot speak to that, correct.

10 Q You also can't speak to whether the willfulness of any
11 infringement that's found has any impact on whether
12 disgorgement is an appropriate remedy, can you?

13 A I would agree with that statement.

14 Q And you've testified in trial and deposition more than
15 200 times since 1990; true?

16 A That's correct.

17 Q And you've testified in trial alone between 75 and 80
18 times just since 1990; correct?

19 A It's closer to 90, but I would agree with that.

20 Q Now, you understand, sir, that courts can take a
21 calculation of a plaintiff's lost profits into account
22 when awarding a remedy in a contempt proceeding; correct?

23 A I'm sorry. If I could just have the question again.

24 Q You understand that courts can take a calculation of a
25 plaintiff's lost profits into account when exercising its

1 broad discretion to award a contempt remedy; correct?

2 A Yep. I understand the Court can exercise broad
3 discretion and take that in consideration, sure.

4 Q But here, you have made no attempt to calculate the
5 profits that Lawson -- excuse me, that ePlus lost as a
6 result of any alleged contempt; correct?

7 A I haven't done that calculation. We might have talked
8 about that during my deposition. There's a reason why,
9 but I haven't done that.

10 Q So the answer is you haven't done it?

11 A I have not done it, that's correct.

12 Q Now, in fact, you haven't made any attempt to
13 determine whether ePlus has lost any profits at all as a
14 result of conduct during the contempt period; true?

15 A In terms of -- if you are asking the calculations that
16 I did, you are absolutely right. I did disgorgement
17 measures, the three that I talked about. I did not do a
18 lost profits calculation.

19 Q Sir, that wasn't my question. My question is this:
20 It's true that you made no attempt to determine whether
21 ePlus lost any profits at all as a result of Lawson's
22 alleged contempt; correct?

23 A You are asking did I make that attempt. I want to
24 make sure I have your question. I did not do that
25 calculation.

1 Q Let me ask it one more time and see if you can answer
2 yes or no --

3 THE COURT: He's trying to find out the answer
4 whether you made a calculation or not.

5 THE WITNESS: I did not make that calculation.
6 If that's what he's asking, I did not --

7 THE COURT: The question is, did you attempt to
8 find out the information, i.e., by asking somebody. Did
9 you ask Mr. Farber how much profits did you lose, for
10 example? That's part of what he wants to know.

11 Q Right. And you did actually talk to Mr. Farber;
12 right?

13 A Yes.

14 Q But you didn't ask him that, did you?

15 A That's correct.

16 Q Now, in coming to your opinions in this case, you
17 didn't see any market share data specifically pertaining
18 to the period from the injunction forward; correct?

19 A That's correct.

20 Q You didn't see any data about ePlus's post-injunction
21 revenues; correct?

22 A I believe that to be correct, yes.

23 Q You didn't consider any information about ePlus's
24 profits post-injunction; correct?

25 A That would be correct.

1 Q You didn't have any data concerning the number of
2 post-injunction sales made by ePlus; correct?

3 A Correct.

4 Q You can't speak to whether, in fact, after the
5 injunction was entered, ePlus went out and tried to win
6 any business from Lawson customers; correct?

7 A I can't speak to those activities post -- are you
8 asking post --

9 Q Let me ask it again and see if you can answer yes or
10 no for me. You can't speak to whether, in fact, after the
11 injunction was entered, ePlus went out and tried to win
12 business from Lawson's customers; correct?

13 A That's correct.

14 Q Now, you are not offering an independent opinion in
15 this case that lost profits are incapable of calculation,
16 are you?

17 A I've read some of the court papers, but I'm not giving
18 an independent assessment of that.

19 Q So is that a -- you are not offering that opinion?

20 A I believe you asked me if I'm giving an independent
21 opinion as to whether lost profits can be calculated. Is
22 that what you are asking me?

23 Q Let me ask it again, see if you can answer yes or no
24 for me. You are not offering an independent opinion that
25 lost profits are incapable of calculation, are you?

1 A I'm not giving an independent opinion of that. I've
2 read some of the Court's orders and opinions, but I'm not
3 giving an independent opinion on that.

4 Q But since my question went to an independent opinion,
5 your answer is you are not?

6 A I'm not, that's correct.

7 Q Now, you've calculated lost profits in patent cases
8 somewhere between 20 and 50 times; correct?

9 A I'm not sure if I remember the number, but I've done
10 it many times, yes.

11 Q Do you have any reason to disagree with that?

12 A No, no.

13 Q You are aware that another measure the courts use for
14 contempt awards in some cases is a reasonable royalty or
15 the equivalent thereof; correct?

16 MR. STRAPP: Objection, Your Honor. Your Honor
17 has already ruled on the reasonable royalty and has struck
18 Dr. Putnam or any expert from talking about that in the
19 contempt hearing. I think this question is improper.

20 MR. DUSSEAUT: Your Honor, there was no motion
21 or ruling whatsoever about asking this expert about his
22 decision not to try and measure reasonable royalty.

23 THE COURT: Overruled.

24 Q Let me ask the question again. You are also aware
25 that another measure courts use for a contempt award is

1 reasonable royalty or the equivalent thereof; correct?

2 A Or they can consider it, sure.

3 Q You are not offering a reasonable royalty opinion in
4 this case; correct?

5 A That's correct.

6 Q You've calculated reasonable royalties in patent cases
7 at least 50 times, sir; correct?

8 A I would probably agree with that.

9 Q In fact, at the time of your deposition -- we met
10 before, right, when I took your deposition?

11 A In the deposition, yes. I alluded to that a little
12 bit ago, but, yes.

13 Q At the time of your deposition in this case, you could
14 only think of one time other than this case that you were
15 retained as a testifying expert in a patent-related case
16 in which you didn't offer an opinion as to either lost
17 profits or reasonable royalty; isn't that true?

18 A I'm not sure if I remember that, that answer, that I
19 only could think of one time, there was -- I'm struggling
20 a little bit with the question. Are you saying there's
21 only one time when I could not give either of those, or I
22 didn't give either of those?

23 Q Let me ask the more direct question. As you sit here
24 today, can you think of any other case in your career,
25 patent-related case, where you have offered neither a

1 reasonable royalty or lost profits opinion?

2 A Generally, to the best of my recollection, I usually
3 offer a lost profits or a reasonable royalty opinion.
4 There's been other times where I've done disgorgement-
5 related opinions relating to intellectual property, but
6 generally, in a patent infringement context, I will give a
7 lost profits or a reasonable royalty.

8 Q You are not offering any opinion that you are
9 incapable of doing a reasonable royalty calculation in
10 this case; correct?

11 A I'm not giving that opinion, no.

12 Q Counsel for ePlus didn't ask you to do a reasonable
13 royalty in this case; right?

14 A I would agree with that.

15 Q So you didn't do it; right?

16 A That's correct. There was discussion -- you've seen
17 what I presented, the disgorgement approach.

18 Q Now, you referred earlier in this cross-examination to
19 some of the others cases in which you've testified, some
20 of the other work that you've done about disgorgement; do
21 you recall saying that?

22 A I believe I had a question as to the different types
23 of cases that I've testified on.

24 Q And you responded to one of my questions by referring
25 to other work that you've done that involved disgorgement;

1 do you recall that?

2 A I remember talking about different causes of action.

3 Q Let me just get to it. You were an expert witness in
4 the trial in the *TiVo* case, weren't you?

5 A Yes, I was.

6 Q And in that case, you offered the Court a
7 \$974.5 million disgorgement revenue of DVR profits;
8 correct?

9 A That was one of the menu of options I gave to the
10 Court, yes.

11 Q And there were two items on that menu; right?

12 A Yes.

13 Q The other menu item that you gave that Court was one
14 based on a reasonable royalty; correct?

15 A Yes. The jury had come back with a reasonable royalty
16 answer -- I had testified at trial as to a reasonable
17 royalty. The jury found that appropriate. They came back
18 with a number that I said, so when it got to the contempt
19 phase, it was also natural to have a reasonable royalty on
20 the menu. So, yes, I did do that.

21 Q So the answer to the question I asked is yes.

22 A Yeah, sure, yes.

23 Q Now, in *TiVo*, the district court rejected your
24 disgorgement remedy as unreasonable under the
25 circumstances of that case; correct?

1 MR. STRAPP: Your Honor, I believe this beyond
2 the scope of my direct.

3 MR. DUSSEAUT: He testified on direct about his
4 effort to provide assistance to the Court by offering a
5 menu to address your if/then situations. I think I'm
6 allowed to explore that in other cases he's chosen to
7 offer some menu items he didn't choose to offer today.

8 THE COURT: Overruled.

9 Q Let me ask you the question again.

10 A Sure.

11 Q In *TiVo*, the Court rejected your disgorgement remedy
12 as unreasonable under the circumstances of the case;
13 correct?

14 A I don't remember the phraseology, but it is true that
15 when you give a menu and only one is chosen, the other
16 ones are not chosen, so I don't disagree the Court didn't
17 take all options.

18 Q Are you taking issue with the fact that the Court
19 actually deemed your disgorgement remedy to be
20 unreasonable?

21 A No, I'm not taking issue with that. I'm just saying
22 that when you give you a menu -- when you give a menu of
23 options, there's going to be options that aren't taken.
24 The Court, in that case, as you know, did take exactly one
25 of my options.

1 Q Sure, but I want to be very careful that we're
2 focusing on my questions here, sir. I'm not asking
3 whether he picked one of two reasonable choices. I'm
4 asking whether it's accurate to say that the Court in *TiVo*
5 found your disgorgement remedy to be unreasonable; yes or
6 no?

7 THE COURT: Under the circumstances.

8 MR. DUSSEAUT: Under the circumstances, yes,
9 sir.

10 Q It did, didn't it?

11 A If you will just bear with me --

12 THE COURT: Do you remember what the Court held
13 on that point?

14 THE WITNESS: That's what I was trying to do. I
15 as trying to --

16 THE COURT: Just say, no, I don't remember, if
17 you don't remember.

18 THE WITNESS: I'm willing to accept the spirit of
19 what you said. I don't remember the exact words.

20 THE COURT: I can read what they say.

21 Q Would it help you if I pulled out the opinion --

22 THE COURT: I can read it. Either they did or
23 they didn't.

24 Q The Court also described your disgorgement remedy as
25 seeking to punish EchoStar for its actions; correct?

1 A I'll accept your representation. I don't remember the
2 exact phraseology.

3 Q And instead, the Court adopted your measure that was
4 based on a reasonable royalty; correct?

5 A What I call a reasonable royalty plus, yes.

6 Q When you say plus, you are talking about a \$1
7 adjustment that was made to the royalty based on increase
8 in what EchoStar was charging; correct?

9 A It was the royalty the jury awarded, and I gave the
10 menu to the Court of that royalty plus a \$1 addition to
11 that based on a number of factors.

12 Q Dr. Ugone, do you understand that ePlus is taking the
13 position in this case, in this proceeding, that Lawson is
14 in contempt not only with respect to RQC but also with
15 respect to continuing use of RSS by customers after the
16 date of the injunction?

17 A The way I understand it is, is that there's an
18 infringing configuration three and infringing
19 configuration five. I think of it as the totality of my
20 understanding of what's been defined as infringing
21 configurations, but those have been ongoing and provided
22 to the marketplace. That's how I think about it.

23 Q Just to clarify, nobody has found a configuration with
24 RQC to be infringing yet; right? Isn't that true?

25 A Well, I just know three and five is what I'm --

1 Q RQC -- let me ask a couple foundation questions. RQC
2 is the workaround change to what was RSS; correct?

3 MR. STRAPP: Objection, Your Honor. This is also
4 beyond the scope. We're going into technical areas which
5 I never asked the witness about.

6 THE COURT: You are getting a little far afield,
7 I think.

8 MR. DUSSEAULT: Well, maybe I'll bring it back,
9 Your Honor. This issue is actually totally within the
10 scope. I was just trying to lay a foundation.

11 Q Do you understand, sir, just on a very basic level,
12 that there was the RSS product that was at issue in the
13 case, and there's an RQC workaround that's at issue now?

14 A Yeah. Sometimes I use different words, so there's the
15 requisition self-service, there was Requisition Center.
16 Those are the initials that you are using. I do
17 understand that the attempted workaround was what I call
18 the Requisition Center. If that's what you're asking, I
19 do understand that.

20 Q Now, you assume for purposes of your opinion that the
21 Court finds RQC to be infringing; right?

22 MR. STRAPP: Your Honor, I just object for
23 clarity sake. It's not RQC that is infringing. It's the
24 configuration that's made up of several modules. RQC is
25 only one of those modules.

1 MR. DUSSEAULT: I'll ask a better question.

2 Q You assume for purposes of your opinion that the Court
3 finds configurations three and five using RQC rather than
4 RSS to be infringing; correct?

5 THE COURT: You're assuming that there's a
6 finding of infringement that authorizes damages of some
7 kind.

8 THE WITNESS: That's correct, or that there's a
9 violation of the injunction order. That's what I said
10 very, very early on, that that's an assumption.

11 Q Assume hypothetically that the Court finds that
12 configurations with RQC, the new workaround product, don't
13 infringe. Are you with me so far?

14 A Yes.

15 Q So the only issue left for the Judge to decide is
16 whether the customers who used RSS after the injunction
17 date, whether customers used RSS after the injunction
18 date, and, therefore, Lawson is in contempt on that basis;
19 can you assume that?

20 A Yes.

21 Q Now, you offer no opinions to the Court in this case
22 as to the identity or numbers of customers who allegedly
23 used RSS after the injunction -- excuse me. Let me ask
24 again, because I'm tripping over my words. I want to be
25 sure it's right.

1 You've offered no opinion in this case as to the
2 identity or number of customers that allegedly used RSS
3 after the effective date of the injunction; true?

4 A If you are saying to me have I taken my numbers and
5 split out those customers that are still using the RSS
6 versus the Requisition Center as part of the infringing
7 configuration, I haven't separated those numbers if that's
8 what your question is.

9 Q Thank you. I appreciate that, but I'll take it a step
10 further. You haven't even analyzed what customers are or
11 aren't using RSS; right?

12 A I would have to go back and look and see if that's
13 actually in our work papers, if one could tell that or
14 not, but that's not a calculation that I have separately
15 done.

16 Q And you haven't offered this Court a measure of
17 damages in the event the Court finds configurations with
18 RQC are non-infringing, but folks who continue to use RSS,
19 they are infringing; correct?

20 A I have not provided that number today. The only
21 caution I would give is, there's some profitability
22 numbers that one might be -- the Court might be able to
23 apply to some revenue numbers if they have the revenue
24 numbers. So I think some of the cost considerations would
25 go over, but I have not provided a separate number.

1 Q So in the if/then construct of your opinions, if the
2 Court finds I will award contempt only as to people using
3 RSS, then you have not given the Court a measure; right?

4 A Not a bottom line measure, that's correct.

5 Q Have you given a top line measure?

6 A What I'm trying to say is there's the costs side of
7 it. If the Court had --

8 THE COURT: You're saying there's information in
9 there that somebody could use to come to that conclusion
10 if they were inclined to do that, but you haven't done it.

11 THE WITNESS: That's correct.

12 MR. DUSSEAUT: Thank you.

13 Q Now, you've offered three different disgorgement menu
14 items to the Court; revenues, gross profits, and
15 incremental profits; correct?

16 A Yes.

17 Q And your position is that those measures provide
18 assessments of the gain to Lawson by not complying with
19 the injunction order; correct?

20 A That's correct.

21 Q And the gain to Lawson by not complying with the
22 injunction order, assuming that's what the Court finds, is
23 the difference between the profits that Lawson earned by
24 engaging in enjoined conduct versus what it would have or
25 could have earned if it hadn't engaged in enjoined

1 conduct; right?

2 A I believe that could be a way of phrasing it, sure.

3 Q Now, you've reviewed the Federal Circuit ruling;
4 right? That was one of the ones on the slides you looked
5 at?

6 A Yes.

7 Q And you would agree that under the Federal Circuit
8 ruling, Lawson is free to do business with customers as to
9 several of the modules of configuration three and five as
10 long as those customers don't have Punchout; correct?

11 A I think I'll go along with the spirit. My
12 understanding is, is that there's -- my understanding is,
13 as a nontechnical person, there's two infringing
14 configurations we're talking about, and if there's
15 something else that's going on that doesn't match up with
16 those infringing configurations, then that's okay.

17 Q In arriving at your disgorgement measures, your three
18 measures, you treated Lawson's gain 100 percent of the
19 revenues that Lawson earned from customers with
20 configurations three and five; correct?

21 A You are going to have to ask that question again,
22 because I don't think it's quite right.

23 THE COURT: I think the answer to that one is no
24 if you don't think the answer is right.

25 THE WITNESS: No.

1 Q Let me try and clarify. You have identified -- what
2 you've tried to do in the process that Mr. Strapp took you
3 through is identify the revenues that are attributable to
4 the customers with configurations three and five for those
5 configurations; right?

6 A Yes. Well, attributable -- the revenues attributable
7 to those configurations and customers.

8 Q And once you identify that revenue -- let's say you
9 were to disgorge all of that revenue. It would be
10 100 percent of that revenue.

11 A Of the revenue associated with the infringing
12 configurations.

13 Q So you don't calculate what portion of that revenue,
14 if any, Lawson might still be able to have gotten by
15 selling a different configuration, let's say configuration
16 two?

17 A I have not calculated revenues associated with
18 non-infringing configurations, so what I --

19 THE COURT: That's enough.

20 Q Let's go ahead and put up -- we have a couple slides
21 about this, slide 1102. I think you'll be seeing it on
22 your screen.

23 MR. STRAPP: Your Honor, before we get into these
24 questions, I think this is beyond the scope. I didn't ask
25 about configuration two, and, in fact, configuration two

1 isn't even part of this proceeding, so I'm not sure where
2 Mr. Dusseault is going, but objection, beyond the scope.

3 THE COURT: I lost the last part of what you
4 said.

5 MR. STRAPP: Objection, beyond the scope, is a
6 short way of saying it, because I think this is not only
7 beyond my direct, but I think it's also beyond the scope
8 of this proceeding.

9 MR. DUSSEAULT: My position on that, Your Honor,
10 would be the witness expressly testified that what he's
11 trying to do is measure the gain to Lawson, and he's
12 assuming that the gain is 100 percent of the revenues from
13 configurations three and five.

14 If Lawson can comply by selling the customer
15 configuration two, then that's a faulty assumption as to
16 the gain. So I'd like to ask him a few questions about
17 that subject.

18 MR. STRAPP: Your Honor, his opinion is about the
19 revenues and profits that Lawson earned from
20 configurations three and five. He has offered no opinion
21 about what Lawson might do in the future with respect to
22 selling those customers configuration two.

23 That's not at issue in this proceeding. He has
24 no opinion about it. It's not in his report. It wasn't
25 in the scope of my direct, and this proceeding is confined

1 to the modifications that were made relevant to
2 configurations three and five. I don't think see the
3 relevance whatsoever.

4 MR. DUSSEAUT: I think I can clarify, because I
5 think Mr. Strapp may be misunderstanding what I said. I'm
6 not talking about what Lawson would do going forward.
7 There's a gain premise that he's talked about which is
8 comparing compliance with noncompliance.

9 The witness seems to be assuming that
10 noncompliance means foregoing all the revenue. If
11 lawfully Lawson could have complied with the injunction by
12 selling a different product, that's something I'd like to
13 explore, at least to know whether he's thought about that.

14 MR. STRAPP: Your Honor, he's offered no opinions
15 about what Lawson could have done by selling some other
16 product. It's beyond the scope of his opinion, beyond the
17 scope of my direct.

18 THE COURT: Sustained.

19 Q Now, Dr. Ugone, do you understand that in this
20 proceeding, Lawson contends that configurations three and
21 five have substantial non-infringing uses?

22 MR. STRAPP: Your Honor, I'm going to object
23 again. It's beyond the scope of the direct, it's beyond
24 the scope of the opinions, and it's beyond the scope of
25 the contentions that Lawson made. I think this came up

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1 earlier today when substantial non-infringing use was
2 raised on cross-examination of another witness, and the
3 question was made, well, has that been part of these
4 proceedings, has an allegation been made by Lawson and is
5 there evidence in the record.

6 There isn't. The witness hasn't examined any.
7 He certainly hasn't relied on any in forming his opinions,
8 so I would ask Your Honor to sustain the objection because
9 it's not relevant and it's beyond the scope of my direct.

10 MR. DUSSEAULT: Your Honor, if I may, it's
11 absolutely untrue to say that it hasn't been addressed in
12 reports. Dr. Putnam specifically addresses appropriate
13 measures for a remedy in the event that the Court might
14 find that there are non-infringing uses. He did that in
15 his supplemental report, and Dr. Ugone addressed and
16 responded to that position in his last of four reports,
17 and it's a relevant issue, Your Honor, to probe --

18 THE COURT: It was in his report; is that what
19 you are saying?

20 MR. DUSSEAULT: It was absolutely in Dr. Putnam's
21 report, and a response was in Dr. Ugone's.

22 MR. STRAPP: Your Honor, a couple things. First
23 of all --

24 THE COURT: Your answer to that is?

25 MR. STRAPP: In the reply report, he responded to

1 Dr. Putnam's opinions. He doesn't have any affirmative
2 opinions about non-infringing uses. It was just simply a
3 rebuttal to Dr. Putnam, and the second thing I might
4 mention is that Dr. Putnam isn't qualified. He's a
5 damages expert, not a technical expert, who could offer
6 opinions on substantial non-infringing uses in any event.

7 THE COURT: I think that the bottom line is it's
8 beyond the scope of the opinions expressed here today.
9 Whether he said something about it in his report doesn't
10 open the door to letting it in today.

11 MR. DUSSEAUT: Your Honor, if I could respond to
12 that, because I disagree with that for just this reason:
13 He has offered opinions that when you identify the revenue
14 for configurations three and five, what you do is you, as
15 the Judge, would disgorge either all of those revenues or
16 the profits.

17 I'm allowed to probe the reliability of that by
18 looking into the fact that he's ignored the potential that
19 what he's grabbing there is both revenue from infringing
20 activity and --

21 THE COURT: You can ask that question, but that's
22 the only question, I think, you can get him to, and the
23 answer is he didn't consider it, and there isn't -- to my
24 knowledge, there is not one bit of substantive evidence
25 about non-infringing uses that have been tendered in the

1 case. There have been -- there was questions asked of an
2 expert witness, but that's not substantive proof that
3 there's a non-infringing use that I know of. You all can
4 tell me if there's substantive proof of something other
5 than what Dr. Weaver was asked about.

6 MR. DUSSEAUT: Your Honor --

7 THE COURT: Is there? Have I missed that part of
8 the testimony?

9 MR. THOMASCH: Your Honor --

10 THE COURT: Who testified to it other than what
11 you asked Dr. Weaver, I guess is my question.

12 MR. THOMASCH: We think that Dr. Weaver made
13 clear, and there is no dispute that everything that can be
14 done with configuration two can be done with configuration
15 three or five.

16 THE COURT: I'm going to ask -- I'm going to use
17 Mr. Dusseault's technique. How about answering my
18 questions? Where did anybody testify to it other than
19 what Dr. Weaver said? That's the first question.

20 MR. THOMASCH: I hadn't thought that through. I
21 think its through the record as a whole, and it wasn't
22 identified as such, but the facts that would allow you to
23 find it are there.

24 THE COURT: No. I want to know who testified to
25 it. Then I can find it and recall it, but I don't

1 remember any testimony of it, and the record as a whole
2 doesn't help me a whole lot, because I have to confess, I
3 don't have it all memorized.

4 MR. THOMASCH: I think it's best we submit that
5 in writing then.

6 THE COURT: I think so, too, if there's any proof
7 on it. You can ask the one question I think you're
8 asking, is, did you, in your calculation, take into
9 account whether there might be non-infringing uses for
10 configurations three and five.

11 Q Do you need me to repeat the Judge's question, or
12 would you like to answer that?

13 A I think I understand the question.

14 THE COURT: What is your answer?

15 THE WITNESS: I need to say I'm not the technical
16 person. Obviously, there's a lot going on in that
17 concept. What I calculated was the revenues associated
18 with the two infringing configurations. I didn't
19 calculate anything else.

20 THE COURT: Okay. We know that. All right,
21 let's go on to what we are dealing with.

22 Q So let's talk a bit --

23 THE COURT: I have this big fat notebook, and you
24 haven't asked any -- oh, I see. It's not all exhibits.

25 MR. DUSSEAU: Most of the fatness is the four

1 reports.

2 THE COURT: I see now.

3 Q Dr. Ugone, Mr. Strapp walked you through this, but is
4 it fair to say that the first step of using your
5 disgorgement method was to identify the revenues that are
6 attributable to the customers who have configurations
7 three and five for those configurations?

8 A I would agree with that, sure.

9 Q And could that be referred to as the revenue base?
10 Would it be fair to refer to that as the revenue base for
11 purpose of what you are doing?

12 A For the purpose -- I've never called it the revenue
13 base. It's the revenues associated with the infringing
14 configurations during the injunction period.

15 THE COURT: Excuse me a minute, Mr. Dusseault.
16 How much more do you have of this witness? I'm not trying
17 to rush you. I'm trying figure out when the best time to
18 change court reporters is.

19 MR. DUSSEAULT: My best estimate, Your Honor, is
20 45 minutes, but I would try to keep it to 30.

21 THE COURT: I understand. We'll take a 20-minute
22 recess and change now.

23

24 (Brief recess.)

25

1 THE COURT: I have been asked by the GSA how
2 much longer you-all have got. You say you've got 45
3 minutes or so. You've got your own witness, don't
4 you?

5 MR. DUSSEAULT: I do, Your Honor.

6 THE COURT: That's how long? A couple hours.

7 MR. DUSSEAULT: Your Honor, accepting that
8 everything has taken a bit longer than we thought, I'd
9 say between two and three hours probably, including
10 cross.

11 MR. STRAPP: The one thing that's taken less
12 time, I thought mine would take an hour and a half,
13 and my direct took an hour.

14 THE COURT: We're not levying fault here.

15 You're in trouble, Mr. Dusseault. You're
16 about to get smacked. He's already been punished.
17 He's a Duke fan. Leave him alone.

18 MR. DUSSEAULT: When I said two to three
19 hours, I was incorporating the cross.

20 THE COURT: Okay. I think I'd rather do it
21 Monday, than to stay Saturday, to tell you the truth,
22 because we've got the injunction argument to do, too,
23 don't we?

24 MR. STRAPP: We do, Your Honor.

25 MR. DUSSEAULT: Your Honor, I believe our

1 side has an issue as to the injunction argument for
2 Monday.

3 MR. THOMASCH: Your Honor, we'll do whatever
4 schedule works for Your Honor. I did want to ask the
5 Court for permission to be not present on Monday. I
6 have a prior court engagement that has already been
7 put off by that court once.

8 THE COURT: I'm not going to intrude on
9 another court's docket. I don't think that's right.
10 Is somebody else going to argue the injunction?

11 MR. THOMASCH: If it goes forward on Monday,
12 someone else will argue it.

13 THE COURT: I mean, there are other days.

14 MR. THOMASCH: If it could be done a
15 different day, I would argue.

16 THE COURT: I gather nobody wants to do it
17 tomorrow.

18 MR. STRAPP: We'd prefer --

19 THE COURT: Did you have weddings or
20 something tomorrow you have to go to?

21 MR. THOMASCH: We would be happy to confer
22 with counsel.

23 THE COURT: All right. You-all talk about
24 it.

25 MR. DUSSEAUT: Your Honor, could I ask one

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1 thing? How late could we go tonight? Is there a time
2 that we'd have to be done by?

3 THE COURT: Tell them we need air and to keep
4 it on until 7 o'clock.

5 MR. STRAPP: We'd prefer to wrap this up as
6 soon as possible. So today, tomorrow, Monday.

7 THE COURT: So do I, but I have a stress
8 test, besides this one to go to on Monday morning. So
9 I couldn't do it until Monday afternoon anyway.

10 MR. DUSSEAUT: On Monday afternoon?

11 THE COURT: Anyway, just tell them to keep
12 the air on. Get it until 9 just in case we change our
13 minds.

14 THE CLERK: I can't be here until nine.

15 THE COURT: You can't? All right. Let's go.

16 MR. DUSSEAUT: Thank you, Your Honor.

17 BY MR. DUSSEAUT:

18 Q Dr. Ugone, before the break, we were talking about
19 your calculation of the revenues connected with
20 Configurations 3 and 5. Do you recall that?

21 A Yes.

22 Q And you testified on direct that you used Lawson's
23 data to identify customers who had the combination of
24 stock-keeping units that make up Configuration 3 or 5?

25 A Yes.

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1 Q How many customers did you identify who had that?

2 A I believe it was 72 were Configuration 3, 74 were
3 configuration 5 for a total of 146, if that's what you
4 asked.

5 Q Yes. Thank you.

6 Now, just to be clear, in some of your earlier
7 reports, you dealt with a much higher number of
8 customers, correct?

9 A In another context, I think.

10 Q Right. But when you prepared your first two
11 reports in this case, I believe you were looking at a
12 customer group of as large as 800; is that correct?

13 A I think that was data provided by Lawson, but I do
14 remember numbers of that size, yes.

15 Q Did you in your reviews of the data, sir, see any
16 customers who did not have Punchout at the beginning
17 of the injunction period but acquired it during the
18 injunction period?

19 A If I understand your question, I believe we saw
20 some customers, and I'm doing this from memory, where
21 the Punchout revenues started during the injunction
22 period, yes, to the best of our knowledge from looking
23 at the data.

24 Q How did you handle that kind of a customer for
25 purposes of calculating the revenue if they were a

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1 customer who did not have Punchout when the injunction
2 was entered but obtained it later?

3 A So the date at which we saw the Punchout was when
4 we'd start picking up the revenues.

5 Q For purposes of your three measures, you count all
6 of the revenues that that customer had as of the date
7 that they picked up Punchout?

8 A From that point forward, if that's what you're
9 saying.

10 Q For purposes of measuring that customer's gain,
11 you assume that as of the moment they picked up
12 Punchout, had Lawson complied, it would have lost not
13 just the Punchout revenue but all the revenue it had
14 before?

15 A Actually, let's make sure we're speaking the same
16 conceptually here. What I measured was the revenues,
17 gross profits and incremental profits associated with
18 a provision of an infringing configuration, either 3
19 or 5.

20 So I'm trying to directly answer your question.
21 So once you have an infringing configuration, my
22 understanding is that it's that entire configuration
23 that I've shown in the diagrams. And so we picked up
24 all the revenue from that point forward.

25 Q Yes. I just want to be sure I understand, sir.

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1 You picked up all the revenue from that point forward
2 and you include in your disgorgement remedy all of the
3 revenue from that customer from the moment that that
4 customer picked up Punchout?

5 MR. STRAPP: Objection, asked and answered.

6 THE COURT: Well, I think he's trying to
7 clarify it. And I'd like to clear the answer. So go
8 ahead.

9 A I can't agree with the way you phrased it.

10 THE COURT: Go ahead and answer it the way --
11 give him the answer to the question. How did you
12 treat that revenue?

13 THE WITNESS: Okay.

14 A To your question, the answer is no. How I did
15 treat it was I picked up for the infringing
16 configurations all the revenues. You said all the
17 revenue of the customer. All the revenue for the
18 infringing configurations of the customers.

19 Q That you for the clarification.

20 So if a customer had all the pieces of
21 Configuration 3, let's say, before a certain date
22 except Punchout, are you with me so far?

23 A I believe so.

24 Q And then on a date within the injunction period
25 that customer picked up Punchout, with me on that?

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1 A Yes.

2 Q You include in your disgorgement measure
3 100 percent or all of the revenues for that customer
4 as to Configuration 3 from the day they picked up
5 Punchout forward, correct?

6 A That's correct. My understanding of the
7 infringing configuration is the modules I showed, and
8 so I picked up all of those revenues.

9 Q So you treat as Lawson's gain all of those
10 revenues even though Lawson was lawfully selling them
11 and maintaining and servicing all the other modules up
12 to the moment that they got Punchout, right?

13 A I might use different words, but what I said was I
14 was picking up all of those revenues associated with
15 an infringing configuration. Going forward I did make
16 a comparison. I think this directly answers your
17 question. I did make the comparison as to what was
18 being sold previously.

19 Q But you essentially assume from the day they got
20 Punchout forward had Lawson complied, it would have
21 gotten none of the revenue from that configuration,
22 right?

23 A No, I would say the assumption is a different one.
24 The question I was answering is what is the revenues
25 that Lawson got associated with the infringing

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1 configurations, which would be all the modules that I
2 showed. That's how I would describe the calculations.

3 Q All right. Okay. Now, when talking about
4 revenue, Mr. Strapp asked you about an apportionment
5 that you made for large suite SKUs, do you recall
6 that?

7 A For large suite SKUs, yes.

8 Q I don't want to revisit that at all, but basically
9 you found that there were certain SKUs that included
10 both products that are part of the enjoined
11 configuration and also products that aren't mentioned,
12 and so you apportioned to reflect that fact; is that
13 fair?

14 A What we did was we were just trying to capture the
15 infringing configuration revenues. So I excluded
16 things that were not part of the infringing
17 configuration. So that involved an apportionment, but
18 really, the point was excluding that which is not part
19 of the modules that make up the infringing
20 configuration.

21 Q Okay. And you would agree with me that it would
22 be erroneous to include in a disgorgement award
23 revenues as to SKUs that aren't mentioned in the
24 injunction as part of the configuration, correct?

25 A I would -- well, what I attempted to do in my

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1 calculation was pick up Configuration 3 or 5. So I'm
2 not picking up other modules.

3 Q Right. Other modules that may be part of the
4 large suite SKU?

5 A That's correct. If I understand your question,
6 that is correct, yes.

7 Q Would you agree with me that it would be erroneous
8 to include revenues from another module that's
9 included in the large suite SKU but is not part of
10 what's identified as Configuration 3 or 5?

11 A I would want to pick up only those modules that
12 are part of the infringing configurations. So I
13 believe that's a yes. It depends on maybe what other
14 question you ask me, but I think I agree with you.

15 Q And all three of the measures that is you offer
16 the Court include this apportionment for large suite
17 SKUs, right?

18 A Yes.

19 Q The revenues that you come to after making that
20 apportionment is roughly \$29.4 million through
21 November 30, 2012?

22 A During the injunction period, sure.

23 Q You talked about a daily rate later, but you
24 didn't calculate your numbers to include the daily
25 rate. Is there any particular reason you chose not to

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1 do that?

2 A I don't understand your question.

3 Q When you gave numbers, and there were some numbers
4 up on the slides that Mr. Strapp did with, you recall
5 that?

6 A Yes.

7 Q Those were numbers just through November 30 of
8 2012, right?

9 A Are you talking about the daily rate or are you
10 talking about the aggregate numbers?

11 Q Yes. You provided an aggregated number and you
12 provided a daily rate, right?

13 A Yes.

14 Q But you haven't calculated for the Court if the
15 Court were to issue an award today how much money that
16 would be, correct?

17 A If you're asking if I took that daily rate times
18 the number of days between November 30, 2012 and
19 today, I haven't done that multiplication if that's
20 what you're asking.

21 Q Does it sound about right that if you take your
22 daily rate and you add it to the period that ended on
23 November 30 at your daily rate, if you calculated it
24 today, it would be roughly \$37 million of revenue?

25 A I would have to do the calculation.

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1 Q You haven't done that?

2 A I haven't done that calculation.

3 Q Now, when you offered your reports and your
4 opinions in your reports -- strike that.

5 When you offered your opinions in your reports in
6 this case, you actually made a second apportionment to
7 revenue that you didn't talk about here today, right,
8 sir?

9 A There was an alternative calculation I provided,
10 yes.

11 Q It's also an apportionment, right, sir?

12 A It does involve an apportionment, yes.

13 Q You actually described it in your report multiple
14 times as an apportionment, right, sir?

15 A Yes.

16 Q There's actually a slide in the binder that I have
17 that wasn't shown to you that talks about this. Can
18 we put number 12 up, please?

19 THE COURT: What number?

20 MR. DUSSEAUT: Slide 12 in ePlus's binder.

21 THE COURT: Do you have it?

22 MR. DUSSEAUT: It's not on my screen.

23 THE CLERK: I don't think they have it.

24 MR. DUSSEAUT: You don't have it
25 electronically, but I have it in my binder?

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1 THE COURT: It's your slide. Do you have it
2 up?

3 MR. STRAPP: We don't have the slide
4 electronically.

5 MR. DUSSEAU: It's in my binder.

6 THE COURT: You don't have it electronically,
7 is that what you're saying? I can't hear you.

8 MR. STRAPP: We took it off of our electronic
9 system because it wasn't used as part of my direct. I
10 think it was left in the physical binders because no
11 one took it out.

12 THE COURT: Well, everybody has it. Do you
13 have it in a binder there in front of you, Dr. Ugone?

14 THE WITNESS: Yes.

15 Q Isn't it true, sir, that this reason you made two
16 apportionments when doing your calculations was in an
17 effort to make sure we are using the right revenue
18 base?

19 A I want to make sure when you said two
20 apportionments, what I did was I provided the
21 calculations that I presented to the Court, and in my
22 report, because I think I understood that Lawson was
23 making certain contentions, I provided an alternative
24 calculation. Page 12 here, like at the top, it says,
25 "Alternative LSF process flow apportionment." And

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1 that's the calculation that we did.

2 Q You keep using the word "alternative calculation"
3 instead of two apportionments. Are you suggesting --

4 A I'm sorry. I didn't hear the beginning of what
5 you were saying.

6 Q You keep correcting me when I talk about two
7 apportionments and saying "alternative calculation."

8 A I didn't know what you meant by two calculations.

9 Q Two apportionments.

10 A I didn't know what you meant by that. But you're
11 saying the first calculation I did and then this one
12 is the two you're counting?

13 Q Right. Do you think -- is it in any way
14 inaccurate to say that in your reports, sir, you made
15 two apportionments to revenue, the one you described
16 to the Court today for large suite SKUs, and a second
17 one for LSF and process flow? You did that, didn't
18 you?

19 A I did those calculations, but I don't think of
20 them as apportionments in the same way that you're
21 using the term.

22 Q Forget about how I'm using the term. Are you
23 saying you don't think of the LSF process flow
24 apportionment as an apportionment?

25 A I'm saying not in the same sense that it was in

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1 the platform technology, the gold box here. So I'm
2 not denying I did two calculations. I did two
3 calculations.

4 Q Are you denying that you referred to it repeatedly
5 in your reports as an apportionment?

6 A As an apportionment for the large suite SKUs, but
7 that was to remove out the modules that are not
8 related to the configurations in dispute.

9 Q All right. Now, I'd like to use the word
10 "apportionment" for purposes of my question and see if
11 you can answer this yes or no. In an effort to make
12 sure that you are using the right revenue base, you
13 proposed two apportionments, correct?

14 A I would not describe it that way.

15 Q All right, sir. Do you remember when I took your
16 deposition?

17 A Yes.

18 Q And it was in Washington, D.C., I believe, in
19 about February of 2012?

20 A I think it was about a year ago.

21 Q Do you recall you were under oath?

22 A I do, sir.

23 Q You testified truthfully, sir?

24 A I'm sorry?

25 Q You testified truthfully on that day when I took

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1 your deposition?

2 A Yes. Yes.

3 Q I'd like you to turn, if you would, to page 305 of
4 your deposition, line 6 through 9.

5 A Let me catch up with you. It's in the binder here
6 somewhere.

7 Q Yes.

8 A Okay.

9 THE COURT: What page?

10 MR. DUSSEAUT: It's page 305, Your Honor,
11 line 6.

12 THE WITNESS: I'm sorry?

13 THE COURT: Line 6, 7, 8 and 9.

14 MR. DUSSEAUT: Yes.

15 BY MR. DUSSEAUT:

16 Q Let me read this testimony to you, sir.

17 Question: Now, in an effort to make sure we're
18 using the right revenue base, you proposed two
19 apportionments in your analysis, correct? Answer:
20 Yes.

21 Did I ask you that question and you gave me that
22 answer?

23 A Yes. And I still stand by that answer. I agree.

24 Q There's no question that the two apportionments we
25 were talking about on that day was one for large suite

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1 SKUs and one for LSF process flow, is there?

2 A Yes. In fact, I used that terminology, but the
3 apportionments are different. There's a different
4 reason for them, but I don't disagree that you used
5 those words and I answered the question.

6 Q I don't think I asked you any questions about the
7 reason for it yet. I'm just trying to say you offered
8 an apportionment when you were talking about measuring
9 revenue that you didn't choose to offer to the Court
10 today, true?

11 A I will agree with you. Only one of the two did I
12 present to the Court.

13 Q Now, LSF and process flow serve as the foundation
14 for Lawson's S3 software program, correct?

15 A Yes.

16 Q But they also support additional sweats of
17 software beyond procurement, correct?

18 A Correct.

19 Q For example, they support Lawson's financial
20 software, correct?

21 A Yes.

22 Q And its human resource software, correct?

23 A I will agree.

24 Q Can we show slide 1111, please? Strike that.

25 Let's go to the slide that everyone has in their books

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1 but is not available electronically.

2 THE COURT: Is that 12?

3 MR. DUSSEAULT: Slide 12, yes.

4 Q Now, slide 12 is, I assume, a slide that you
5 prepared, sir?

6 A Yes.

7 Q This was your effort to explain the LSF process
8 flow, and you describe it here at the top with the
9 word "apportionment"?

10 A Yes.

11 Q And you proposed the apportionment of LSF process
12 flow in this case on your own initiative, not in
13 response to anything that Dr. Putnam argued, correct?

14 THE COURT: Are you talking about the
15 apportionment shown in this slide?

16 MR. DUSSEAULT: Yes, sir. Oh, I'm sorry.
17 That is what I'm talking about.

18 THE COURT: You proposed this apportionment
19 on slide 12 yourself on your own and not in response
20 to anything that Dr. Putnam said in his report is the
21 question. Is that right or wrong?

22 THE WITNESS: That's correct.

23 Q In fact, you did so in your very first report,
24 right?

25 A Yes.

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1 Q You addressed it in every report, all four, that
2 you issued in the case, right?

3 A Yes.

4 Q Obviously, at some point you were intending to
5 discuss it with the Court because it's in our binders,
6 right?

7 A It was part of an initial slide deck as we were
8 putting the slide decks together, yes.

9 Q Now, the apportionment that you do for LSF process
10 flow that you didn't describe today attributes
11 15 percent of revenues from LSF process flow to the
12 infringing configurations and 85 percent of it to
13 other configurations, correct?

14 A That's correct based on a methodology, yes.

15 Q And your methodology was intended to measure the
16 fact that while LSF process flow is used in some
17 context with the infringing configurations, it's used
18 actually in greater proportion, according to your
19 methodology, with other configurations, true?

20 A If I understand your question, I was given the
21 option to the courts when I was writing my report of
22 using all of that yellow box, platform, technology
23 foundation, since that was my understanding of what's
24 part of the infringing configuration. But if the
25 Court deemed that they wanted that bottom box

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1 separated out, that's what this calculation does.

2 THE COURT: What's a bottom box?

3 THE WITNESS: The platform technology
4 foundation, Lawson system foundation and process flow.
5 The yellow box.

6 MR. DUSSEAUT: It may help, Your Honor,
7 because I notice this picture is just of Configuration
8 5.

9 THE COURT: Excuse me, but this does talk
10 about non-infringing modules supporting. You're
11 asking about -- he wasn't asked about it on direct
12 examination, but I guess the real question is where
13 did you get that information, "non-infringing module
14 supported"? What does that mean?

15 THE WITNESS: So if you look at the bottom of
16 12, there's a footnote. So in addition to like
17 Configuration 5 or Configuration 3, there's the human
18 resource management, financial management, and so
19 forth. Just other software products, in a sense,
20 provided by Lawson that are not part of the infringing
21 configurations.

22 Q I think it might help, Your Honor, it's not in the
23 picture that was prepared by ePlus used today, but if
24 we could show our slide 1111.

25 THE COURT: Is that in your book here, slides

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1 binder?

2 MR. DUSSEAUT: It is, but can we put it on
3 the screen as well?

4 THE COURT: Sure. I just want to -- it's
5 1111.

6 MR. DUSSEAUT: I believe it's 1111, yes.

7 THE COURT: All right.

8 THE CLERK: Defense what?

9 THE COURT: It's up.

10 MR. DUSSEAUT: It's slide 1111.

11 THE COURT: That isn't slide 1111 in my book.

12 MR. DUSSEAUT: Your Honor, I see at the
13 bottom here it says DDEM --

14 THE COURT: See this. This is what's 1111 in
15 my book. Is it in your book?

16 THE WITNESS: Yes.

17 MR. DUSSEAUT: Is it the same? Oh, because
18 it's going to build?

19 MR. STRAPP: We haven't built it yet, Your
20 Honor.

21 THE COURT: Okay. I see.

22 THE WITNESS: The boxes just aren't showing
23 up.

24 Q As fun as building is, why don't we just build it
25 so we can look at the whole picture.

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1 THE COURT: All right. We have an occupancy
2 permit, so go forward.

3 BY MR. DUSSEAULT:

4 Q Now, Dr. Ugone, does this demonstrative show what
5 you're looking at with the LSF process flow
6 apportionment in that you attribute 15 percent of LSF
7 and process flow to the infringing configuration, but
8 you recognize and you attribute 85 percent of the
9 revenues from LSF and process flow to other modules
10 like HR and financial?

11 A I think I agree with the spirit of what you're
12 trying to say. I don't think you fully described what
13 I did.

14 Q I'll take the agreement with the spirit.

15 THE COURT: Spirit is getting me.

16 MR. DUSSEAULT: Spirit is important on a
17 Friday afternoon, I think.

18 I'll try and cut a couple things here.

19 Q Sir, if this court were to determine that it
20 should apportion revenues, not just for large suite
21 SKUs -- strike that.

22 If this court were to determine that it should
23 apportion revenues for both large suite SKUs and LSF
24 process flow, from your view as a forensic economist,
25 you don't have any issue with that, correct?

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1 A Can you just ask the question again?

2 Q Yes. If this court were to determine it should
3 apportion revenues for both large suite SKUs and LSF
4 process flow, from your view as a forensic economist,
5 you don't have any issue with that, correct?

6 A If the Court made that determination, then that's
7 within the purview of the Court.

8 Q Now, using the LSF process flow apportionment that
9 you discussed in all four of your reports but not
10 today, that reduces the revenue base as of
11 September 30, 2012, from \$29.1 million to 23 million,
12 correct?

13 A That's correct.

14 Q Now, I'd like to turn to another slide that was
15 used. This one was shown on the screen. Slide 6.
16 EPlus's slide 6. Can you put that up?

17 THE COURT: Is it 23 million even?

18 THE WITNESS: Yes. That's rounded to the
19 nearest million. To the nearest 10. So it's 23.0
20 when you round.

21 MR. DUSSEAUT: So can we put -- Skip, could
22 we switch back?

23 THE COURT: Back to the plaintiff's.

24 Q Now, do you recall when Mr. Strapp showed you this
25 slide, sir?

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1 A Yes.

2 Q Do you recall that the Court asked you why you
3 were treating license and maintenance and service
4 differently for the healthcare customers. Do you
5 recall that?

6 A Why I was compiling over certain time periods,
7 yes.

8 Q Is it fair to say that you were told by ePlus's
9 counsel that you should assume that Lawson was not
10 allowed to get any license revenue from a healthcare
11 customer during the sunset period?

12 A From the designated healthcare customers, yes.

13 Q Now, one way that Lawson could get revenue from a
14 designate healthcare customer during the sunset period
15 would be, say, they called up and said, Hey, I have to
16 add five users because we're expanding our group a
17 bit, you were told by ePlus that Lawson should have
18 answered that question no to the healthcare folks?

19 A The assumption is that that would be in violation
20 of the injunction order.

21 Q Did that make sense to you?

22 A Frankly, it does. My understanding is that the
23 Court in the injunction order was saying that you can
24 maintain the designated healthcare customers. That's
25 my understanding.

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1 Q Your understanding of the order, and I don't want
2 you to get too far into interpreting the order, but
3 your understanding was that Lawson was allowed to
4 maintain the healthcare customers?

5 A I believe so, yes.

6 Q What it wasn't allowed to do was help the
7 healthcare customers if they called up and said, Hey,
8 I need to add 20 users?

9 A And I agree with you. The order is what it is and
10 it speaks for itself. But that was how we implemented
11 our understanding of the order.

12 Q That leads to about a 900,000-dollar difference in
13 defining the revenue base between you and Dr. Putnam,
14 true?

15 A I believe there is about a 900,000-dollar
16 difference, yes.

17 Q Now, I want to shift from talking about defining
18 the revenue base to talking about these profit margins
19 that you discussed. Once you've determined what the
20 revenues are that derive from the customers with
21 Configurations 3 and 5 as to those configurations, are
22 you with me that far?

23 A Yes.

24 Q You then attempt to measure accurately Lawson's
25 gain as to those customers, correct?

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1 A Measure if you take those two configurations,
2 Configurations 3 and 5, and you have the revenues,
3 what's the profits associated with those revenues.
4 That's the question we're answering. And that's the
5 measure of the gain that we're using.

6 Q And the premise of disgorgement is that you're
7 allegedly taking away the gain from the wrongdoer,
8 correct?

9 A The profits associated with provision of those two
10 configurations if they are deemed to be in contempt of
11 the injunction order.

12 Q Okay. But that's different from what I asked you.
13 So let me ask my question again. The premise of
14 disgorgement is that you're allegedly taking away the
15 gain of the wrongdoer, right?

16 MR. STRAPP: Objection, asked and answered.
17 I think we're just belaboring the process. He got an
18 answer he didn't like and he asked the question.

19 MR. DUSSEAUT: Your let me impeach then. I
20 can skip right to impeachment if you want.

21 THE COURT: All right.

22 Q Do you recall your deposition?

23 A Yes.

24 Q I won't walk through all the things about the
25 oath.

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1 If you could turn to page 299, line 22, sir.

2 A I'm on page 299, line --

3 Q Line 22.

4 A That's where the question starts.

5 Q Right. Through page 300, line 5. Do you see
6 where I am, sir?

7 A Yes.

8 Q The question I asked you was, "And I'm not going
9 to go over what you said about it earlier. We've
10 covered that. I just want to clarify. Revenues --
11 strike that. The premise of disgorgement is that
12 you're allegedly taking away the gain of the
13 wrongdoer, right?" Answer: "Yes". Do you see that?

14 MR. STRAPP: Your Honor, I believe this is
15 not proper impeachment. I think it's consistent with
16 what the witness just testified to.

17 THE COURT: Well, I'm not quite sure it is.
18 Go ahead.

19 Q Did I ask you that question and you gave me that
20 answer, sir?

21 A You asked that question. I gave the answer. What
22 I tried to explain is how I was measuring the gain,
23 which is --

24 Q Thank you, sir. For purposes here I just want to
25 be sure that I asked it and you answered it. That's

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1 true?

2 A Sure.

3 Q That's all I need.

4 MR. STRAPP: Your Honor, can I just under the
5 rule of completeness just ask Mr. Dusseault to read
6 into the record the next few questions and answers?

7 THE COURT: I think you can do that on
8 redirect.

9 MR. STRAPP: All right.

10 BY MR. DUSSEAULT:

11 Q All right. So you have calculated three measures
12 of disgorgement; revenues, gross profits and
13 incremental profits, right?

14 A Yes.

15 Q And you gave the Court the numbers for those with
16 only the large suite SKU apportionment, but not with
17 the LSF process flow apportionment that you referenced
18 four times in four reports?

19 A In my direct, we have now given the Court the 23
20 million on the revenue.

21 Q The gross profit number when you make two
22 apportionments is roughly 14.1 million, correct?

23 A To the best of my recollection I think that's
24 correct, yes.

25 Q The incremental number when you make both

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1 apportionments you had in your report is roughly
2 11.73 million, correct?

3 A That's correct.

4 Q And that's only through November 30, correct?

5 A Through November 30, 2012.

6 Q And I would ask you, because I've tried to
7 calculate what it actually is as of today, but you
8 haven't calculated that?

9 A No, you would -- you could do a daily rate.

10 Q Let's talk about your first measure, which is
11 disgorgement.

12 THE COURT: What would you do? Take the 14
13 million, divide it by the number of days, and that
14 would be the daily rate?

15 THE WITNESS: That would get you close, yes.
16 There's some reasons why it's not exact, but that
17 would get you close.

18 THE COURT: Well, usually when you're doing a
19 judgment, you don't do it close enough for government
20 work. So I guess you can provide us a mechanism to do
21 that?

22 THE WITNESS: Sure, I can do that.

23 MR. DUSSEAUT: To clarify, the witness has
24 testified about what the daily rate is by his
25 calculation. He just hasn't multiplied it out so that

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1 you can see what the number that we're talking about
2 today really is.

3 THE COURT: What is the daily rate by your
4 calculation with both assumptions? It changes. Do
5 you now it, Dr. Ugone?

6 THE WITNESS: I would have to find the
7 exhibit in my report.

8 THE COURT: What?

9 THE WITNESS: I would have to find the
10 exhibit in my report in order to give you those exact
11 numbers.

12 THE COURT: Well, Mr. Strapp can look that
13 up. I don't want to interrupt Mr. Dusseault's
14 examination here. You ask him about it, Mr. Strapp,
15 okay?

16 MR. STRAPP: Yes.

17 BY MR. DUSSEAULT:

18 Q Let's talk about your first measure, sir. The
19 first measure you offer is all of the revenues, and
20 that measure deducts no costs whatever from Lawson's
21 revenues, correct?

22 A That's correct.

23 Q Total revenue isn't a true measure of Lawson's
24 gain, right?

25 A It doesn't deduct out the cost, but it is a

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1 consideration for the Court under certain
2 circumstances. So it's part of the menu of options.

3 Q Total revenue is not a measure of Lawson's gain,
4 correct?

5 A Not from an economic perspective because there's
6 costs that could be deducted.

7 Q What Lawson gains is the difference between the
8 revenue and what it costs to get the revenue, correct?

9 A I would agree with -- I would agree with that. As
10 you know, I think, too, though, but there's times that
11 the Court may consider the revenue, but I'm not
12 disagreeing with you that in order to get to a
13 profitability gain, you would need to subtract out the
14 costs. So I would agree with that.

15 Q Absent a determination by the Court that there's
16 issues with doing deductions of cost, you would not
17 default to a revenue award, true? Let me ask the
18 question again so it comes in cleanly.

19 Absent a determination by the Court that there are
20 issues with doing some deductions of cost, you would
21 not default a revenue award, correct?

22 A I think I would agree with that or absent other
23 considerations by the Court. There may be other
24 considerations the Court may want to take into
25 account.

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1 Q The second measure you offer is gross profits,
2 true?

3 A Yes.

4 Q With two apportionments, that's roughly
5 14.1 million, you said?

6 A Yes.

7 Q Through November 30?

8 A Correct, 2012.

9 Q Now, you used Lawson's company-wide financial
10 information?

11 A Yes.

12 Q To calculate this, right?

13 A Based on those profit and loss statements that we
14 looked at that had the X's.

15 Q Gross profits is revenues minus what economists
16 call the cost of goods sold, right?

17 A Cost of goods sold. I think Lawson sometimes
18 refers to them as direct costs, but yes.

19 Q You would agree with me, wouldn't you, sir, that
20 your gross profit figure fails to deduct all variable
21 costs from Lawson's revenues, correct?

22 A I would agree with that.

23 Q Let me take just one example. You're aware that
24 Lawson has sales costs, right?

25 A Yes.

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1 Q Within those sales costs are commissions, right?

2 A Correct.

3 Q If a sale gets made, the commission gets paid,
4 correct?

5 A Right.

6 Q If a sale doesn't get made, commission doesn't get
7 paid, right?

8 A Right.

9 Q Your gross profit number fails to deduct even
10 those directly variable sales commission, right, sir?

11 A Let's be careful. When you say it fails to
12 deduct, it does not deduct because it's a different
13 measure of profitability. So without putting a
14 connotation on it, there's revenues, gross profits,
15 and then incremental profit. The incremental profit
16 has those extra costs deducted out.

17 Q So you don't want to go so far as saying it fails
18 to deduct it, but you will agree with me it doesn't
19 deduct it?

20 MR. STRAPP: Objection; asked and answered.

21 THE COURT: Sustained.

22 MR. DUSSEAUT: I'll move on.

23 Q You don't take the position that gross profit is
24 the correct measure of Lawson's gain, do you, sir?

25 A I say that that's an option for the Court to

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1 consider. But if you're looking at the incremental
2 profitability, obviously, additional costs have to be
3 subtracted from the gross profits.

4 But my understanding is there's times that a Court
5 may consider the gross profits. So I've provided
6 that -- as I said from the very beginning, I've
7 provided that number.

8 Q Let me try to be very direct in terms of what I'm
9 asking. Direct testimony referred to trying to
10 measure Lawson's gain, that's a word you used, right?

11 A As I've defined it, yes.

12 Q And gross profit is not the correct measure of
13 Lawson's gain as you have defined it, correct?

14 MR. STRAPP: Objection, asked and answered.
15 This is the third time.

16 THE COURT: Overruled.

17 A There are some incremental costs that can be
18 deducted.

19 MR. DUSSEAUT: Your Honor, could you just
20 instruct the witness I'm asking yes or no questions
21 and I'm getting a speech.

22 THE COURT: I agree. Just answer the
23 question yes or no. I think the bottom line, though,
24 is in your judgment, is the correct way to equate your
25 figures with the gain the incremental profit?

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1 THE WITNESS: Yes.

2 THE COURT: That's what you're trying to get
3 at?

4 THE WITNESS: Yes, Your Honor. And I want
5 to -- yes, Your Honor. I'll stop there.

6 Q Now, the third measure that you testified about
7 today is incremental profits, correct?

8 A Yes.

9 Q When you issued your first report in this case,
10 you didn't even give a measure for incremental
11 profits, did you?

12 A If I remember correctly, I believe we had the
13 revenues and the gross profits, if I remember
14 correctly.

15 Q So is it correct that when you gave your first
16 report in this case, you didn't calculate incremental
17 profits?

18 A To the best of my recollection I'm trying to say
19 yes, to the best of my recollection.

20 Q If you have some question about it, shall we look?

21 A No, I'm just saying to the best of my
22 recollection.

23 THE COURT: There are two good words that are
24 helpful in answering questions; one is yes, and one is
25 no. Let's try to use those. If you need to explain,

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1 you can explain, but let's at least get yes and no at
2 the front end.

3 Also Mr. Strapp has an opportunity to come
4 back and cross-examine. And it delays things to have
5 extraneous speeches. All right.

6 Q In your original report, there was no calculation
7 of incremental profits. Dr. Putnam responded and
8 attempted to give an economic measure of incremental
9 profit as a menu item, correct?

10 A Yes.

11 Q It was only after he did that that you tried to
12 calculate another incremental profit figure, correct?

13 A Yes.

14 Q And is it fair to say that Dr. Putnam recognized
15 at least some degree of variability in all three areas
16 of operating costs; R&D, G&A, and sales and marketing?

17 A His calculations --

18 MR. STRAPP: Objection, Your Honor. I think
19 he's asking now the witness to comment on Dr. Putnam's
20 report that's not in evidence, and he has not
21 testified here. In fact, there is a sequestration
22 order that Your Honor has entered. So I believe this
23 is an improper question for those reason.

24 MR. DUSSEAUT: Your Honor, let me clarify.
25 The witness has already testified that he didn't give

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1 an incremental profit number until Dr. Putnam gave
2 one. And then he came in and gave a different one. I
3 should be allowed to ask him what his understanding of
4 what Dr. Putnam's was and why he came up with a
5 different one.

6 THE COURT: I don't think so. Sustained.

7 BY MR. DUSSEAULT:

8 Q You recognize that some portion of Lawson sales
9 and marketing expenses may have been avoided had
10 Lawson ceased to license, maintain, and service the
11 infringing system configurations, correct?

12 A Yes.

13 Q Again, those are costs that your gross profits
14 calculation doesn't deduct, right?

15 A That's correct.

16 Q Now, let me look at another one of the slides Mr.
17 Strapp showed you. Let's look at plaintiff's slide 19
18 if we could.

19 So, Dr. Ugone, just to take these separately, and
20 I'll start with sales and marketing on the right. In
21 your second report, you offered a measure of
22 incremental profits that you hadn't offered originally
23 that treats sales and marketing costs as variable,
24 correct?

25 A Yes.

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1 Q And in the second report, you didn't treat it as
2 100 percent variable. You actually used a calculation
3 of variability that Dr. Putnam had done for sales and
4 marketing, correct?

5 A That's correct.

6 Q But in your fourth report, you changed it and
7 decided to treat 100 percent of sales and marketing
8 expenses as variable, correct?

9 A Yes.

10 Q All right. Now, so when you do your incremental
11 profit figure, you treat sales and marketing as
12 100 percent variable, but you treat product
13 development and general administrative as 100 percent
14 fixed, right, sir?

15 A Yes.

16 Q Now, let's look at the middle entry here, product
17 development. You say that, the slide says here, no
18 evidence of product development expenses relating to
19 Configuration Nos. 3 and 5. Do you see that?

20 A Yes.

21 Q Now, when you say Configuration Nos. 3 and 5, I
22 assume you mean with RQC in the post injunction
23 period. Configuration 3 and 5 that have RQC as a
24 workaround of RSS?

25 A Yes. I'm assuming that the -- I think an

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1 underlying assumption is the workaround would also be
2 found to violate the Court's order.

3 Q Now, you say there's no evidence of product
4 development expenses relating to Configuration 3 and
5 5. Didn't you describe the maintenance fees that
6 Lawson receives for Configuration 3 and 5 as including
7 some R&D, like workarounds, and things like that? Did
8 you say that?

9 A We talked about maintenance. I used the term like
10 if there were bugs or fixes that were required.

11 Q So how does one discover or correct a bug, sir, in
12 a technology? Do you know?

13 A They would work with a customer and research what
14 the problem is.

15 Q So they would do research. They may try and
16 develop a product to fix the bug, right?

17 A No. Or they might just go out to the site of the
18 customer and find out why the software is not working
19 properly. I would not put it into the same research
20 and development catagory at all.

21 Q Isn't it you're understanding that part of what
22 customers pay for when they pay maintenance to Lawson
23 is research and development to fixe and improve the
24 products over time?

25 A What I would say is that they pay to make sure the

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1 product is functioning properly.

2 Q Are you disputing somehow that part of that is R&D
3 to improve it or fix things that are wrong with it,
4 sir?

5 A If you want to call that -- it would go into a
6 different bucket of costs. If you want to say that
7 that's R&D, then it's already in the maintenance. So
8 I'm having problems with the nomenclature that you're
9 using.

10 If you want to call that R&D, it's already
11 accounted for in the maintenance costs.

12 Q Are you saying that there's no R&D costs that are
13 part of what people are purchasing when they pay a
14 maintenance fee?

15 A No. I'm saying something different.

16 Q Okay.

17 A What I'm saying is with the infringing
18 configurations, and there's been testimony to this,
19 that there's been no R&D specific to the infringing
20 configurations that have been identified by Lawson.

21 Q What's the basis for that statement, sir?

22 A Mr. Samuelson's testimony.

23 Q That there has been no research as to the
24 infringing configurations?

25 A That he could not tie any R&D or product

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1 development expenditures to the infringing
2 configurations.

3 Q Do you know when he was asked that question
4 whether he was talking about the infringing
5 configurations, meaning those specified in the
6 injunction order with RSS or similar configurations
7 with the new product RQC?

8 A I can't speak to what was in his mind when he was
9 answering that.

10 Q You reviewed Mr. Samuelson's deposition testimony,
11 sir, as part of coming to your opinions, correct?

12 A Yes.

13 Q And that's what you're basing this on, you said,
14 that your view that somehow there's no R&D as to the
15 infringing products and services, correct?

16 A During the injunction period, correct.

17 Q Can we put up on the screen, and we have Mr.
18 Samuelson's deposition testimony in the binders, but
19 could we put up page 24, lines 14?

20 A Do I also have it in my book?

21 Q Yes. You do have Mr. Samuelson's whole deposition
22 in your book, sir. Page 24, line 14, through page 25,
23 line 3.

24 Now, what you were saying is you base your view
25 that there's no product development as to the

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1 configurations at issue in this case on Mr.
2 Samuelson's statement that he wasn't aware of R&D as
3 to the infringing products and services, correct?

4 A You're going to have to ask that question again.

5 Q You testified, I believe when we were talking
6 about product development, that the reason you
7 concluded there's no evidence of product
8 development -- strike that. Actually, let me try and
9 do this. I may need help with a citation.

10 Turn to page 98, line 19, if you will. Now, I'd
11 like to read to you Mr. Samuelson's testimony, page
12 98, line 19. And this is Mr. Strapp examining Mr.
13 Samuelson.

14 "Okay. And, again, there isn't any specific
15 employee costs associated with employees in product
16 development that you could say should be properly
17 allocated just to infringing products and services in
18 the sense that those product development costs are for
19 an employee who is specifically focused on developing
20 infringing products and services?"

21 Answer: "I don't understand your question, but
22 there are no -- there are no developers, to my
23 knowledge, specifically focused on developing
24 infringing products."

25 Do you see that?

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1 A Yes, I do.

2 Q That's the statement that you use as a foundation
3 for saying that R&D expenses are fixed, correct, sir?

4 A One of them. Not the only one.

5 Q But when you talked about Mr. Samuelson's
6 testimony, that's what you're talking about, right,
7 sir?

8 A One of them.

9 Q Are there other -- can you point me to other
10 statements by Mr. Samuelson?

11 A I think if you get my - is it my second report -
12 where I'm talking about in detail all the costs, and I
13 break out a lot of the rationales for what I'm doing
14 with these operating costs, I give quite a few
15 references to Mr. Samuelson. So if you want to pull
16 out pages 2 through 11 of my second report, I think
17 you'll find all of those.

18 Q But this is one that you specifically cited
19 several times in your report?

20 A Among others, sure.

21 THE COURT: Let me ask you something here. I
22 cannot understand why it would make a great detail of
23 difference what the R&D costs are here because the
24 evidence is all of this happened in about two days.
25 So the R&D costs, whatever they would be, would be

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1 negligible, and I'm not sure why we're spending a lot
2 of time on it.

3 MR. DUSSEAULT: I believe Dr. Putnam will
4 speak to that, Your Honor, but I think that's actually
5 not correct. I can explain, but I think there are
6 costs that Lawson incurs over a two-year period of
7 offering these configurations with RQC that our
8 position is you would not incur those R&D costs or you
9 might reduce your R&D costs if you were just
10 forfeiting, say, \$30 million of revenue.

11 THE COURT: I see.

12 Q Now, just on this point of Mr. Samuelson's
13 statement about infringing products and services, I do
14 want to go back to page 24, line 14, through page 25,
15 line 3. Are you there?

16 A I believe I'm there, yes.

17 Q This is again Mr. Strapp asking questions of Mr.
18 Samuelson. "Okay. Now, what's your understanding
19 regarding how that term is defined, 'infringing
20 products and services'?"

21 Answer: "We referenced the primarily the jury
22 verdict and the specific mention in the actual
23 injunction itself." Do you see that?

24 A Yes.

25 Q So when Mr. Samuelson was talking about R&D on

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1 infringing products and services, he's talking about
2 R&D on the configurations that have RSS, correct?

3 A He's referencing his understanding of what the
4 jury verdict was. I would agree with that.

5 Q Would it surprise you to learn that after the
6 injunction as to RSS, Lawson was not devoting research
7 and development specifically to configurations with
8 RSS? That makes sense economically, right?

9 THE COURT: Say that again.

10 MR. DUSSEAUT: Let me try again.

11 Q Expenses to creating a new product to workaround.
12 But my question -- let me ask a different question.
13 During the year and a half, close to two years that
14 the injunction has been in place, is it your position
15 that Lawson has spent no money on research and
16 development on Configurations 3 and 5 that have RQC?

17 A I believe my understanding is that there was an
18 interrogatory answer that talked about 38,000 to
19 \$75,000 that was used for the development of
20 requisition center.

21 Q So that referred only to RQC, not to all the
22 modules that are in Configurations 3 and 5, correct?

23 A That referred to requisition center, yes.

24 Q Now, you also -- let me ask one more question.
25 Does it make economic sense to you as an economist

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1 that Lawson's R&D costs as to these products would be
2 completely fixed over a two-year period?

3 A Given the nature of how -- my understanding is how
4 the product development department is set up, and
5 given the answers of Mr. Samuelson as the corporation
6 representative, that's how we drew those conclusions.
7 He was saying there were no R&D individuals
8 specifically assigned to these infringing
9 configurations. Those people would have been there
10 regardless.

11 Q What he said was there were none assigned to the
12 infringing products and services as that's defined in
13 the Court's injunction, right?

14 A Or that were focused on those. So there's no
15 incremental costs associated with them.

16 Q You also treat general and administrative costs as
17 100 percent fixed for purposes of your incremental
18 profit calculation, right?

19 A Yes.

20 Q Does that make economic sense to you, sir?

21 A Yes.

22 Q That G&A costs are 100 percent fixed over a
23 two-year period?

24 A Given the answers of Mr. Samuelson in his
25 deposition, and given the smallness of the infringing

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1 configurations relative to the overall size of Lawson,
2 yes, it made sense.

3 Q I want to follow-up on a question that I asked.
4 You say given the testimony of Mr. Samuelson. What
5 I'm looking at is something different. You're an
6 economist, right?

7 A Yes.

8 Q You've been an economist for 30 plus years?

9 A Yes.

10 Q You've testified over 200 times?

11 A Yes.

12 Q You've seen a lot of businesses, right?

13 A Yes.

14 Q Are you saying it makes economic sense to you that
15 general and administrative costs would be 100 percent
16 locked in and fixed over a two-year period?

17 A Okay. I directly said this in my direct
18 examination. I'm not saying in every situation that
19 G&A is fixed or that all of these are fixed. I said
20 in the facts and circumstances of this case when we
21 look at the infringing situations over the injunction
22 period, and you look at the nature of what comprises
23 each of these costs, and you look at the smallness of
24 the revenues as a percentage of overall Lawson
25 revenues, then yes, it makes sense. I'm not saying in

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1 every situation.

2 Q Sir, the revenue calculation that you offered when
3 Mr. Strapp was doing your direct examination was
4 \$29.4 million through September 30. So about
5 \$30 million of revenue lost over a year and a half.
6 It makes economic sense to you that a company faced
7 with a loss of \$30 million of revenue over a year and
8 a half and knowing that that's based on a permanent
9 injunction, wouldn't it make some adjustments to
10 maintain their profit margins?

11 MR. STRAPP: Your Honor, I tried to sit down
12 as much as I can, but I feel like we're retreading the
13 same ground, and it's really belaboring the point.
14 Especially at five p.m.

15 THE COURT: I think his position is clear.
16 Sustained.

17 MR. DUSSEAUT: Okay. Just one minute.
18 Nothing further, Your Honor. Thank you.

19 THE COURT: Any redirect?

20 MR. STRAPP: Just a few.

21 THE COURT: Do you know what in 2011 and 2012
22 Lawson's gross revenues were?

23 THE WITNESS: Yes, I do.

24 THE COURT: What were they?

25 THE WITNESS: So in 2012, it was about

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1 511 million .it was roughly that in 2011. So we're
2 talking \$30 million in relation of year and a half up
3 to about \$750 million.

4 THE COURT: I understand. I can do the
5 relationship. All I asked is what it was. All right.

6
7 REDIRECT EXAMINATION

8 BY MR. STRAPP:

9 Q Can you turn back to Mr. Samuelson's deposition
10 that Mr. Dusseault just reviewed with you, and
11 particularly -- he was talking about page 99 of that
12 deposition. I'd like you to just turn there, and then
13 just move down one page, and I want to ask you about
14 that portion of the deposition transcript that he
15 didn't direct you to.

16 A I apologize. I lost the page number you wanted me
17 to go to.

18 Q Page 100, starting at line 4. Before I get to the
19 transcript, I just want to set the context here. Do
20 you recall Mr. Dusseault was asking you about product
21 development costs?

22 A Yes.

23 Q Now, I want to read the following question and
24 answer from Mr. Samuelson's deposition and ask you
25 whether this was also a basis for your opinion since

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1 Mr. Dusseault focused on one other question here. And
2 here's the question. Line 4.

3 Question: "Okay."

4 THE COURT: Go down to the question. That's
5 a lot of preface there.

6 Q Question. Let's start on line 8. "Is it your
7 testimony that none of the costs associated with
8 product development, sales and marking, or general and
9 administrative costs can be specifically allocated to
10 revenues for infringing products and services?"

11 Answer from Mr. Samuelson, "That is -- yes, that's
12 correct."

13 And my question to you is whether or not that was
14 a statement from Mr. Samuelson that was part or one of
15 the bases for your opinions?

16 A Yes, it was.

17 Q And in way was that a basis for your opinion?

18 A Well, he was the 30(b)(6) corporate representative
19 on these subject matters.

20 Q How did that affect your opinion regarding product
21 development costs?

22 A Well, it told me that none of the product
23 development costs could be specifically allocated to
24 the infringing configurations, which was also
25 supported by other testimony throughout his

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1 deposition.

2 Q Now, Mr. Dusseault also asked you about TiVo.

3 That's a case we've heard a lot about. You, I think,
4 testified on cross-examination that you provided the
5 TiVo court, as you're doing here, a menu of options;
6 is that correct?

7 A Yes.

8 Q And Dr. Dusseault talked about one option that the
9 Court did not accept; is that correct?

10 A Yes.

11 Q Can you describe for the Court the option on
12 damages and disgorgement in that case that was
13 accepted by the TiVo court?

14 A Yes. So I testified at trial as to a reasonable
15 royalty. One of the options that I gave for the
16 contempt hearing in addition to the disgorgement of
17 profits was a reasonable royalty again, but there was
18 an addition onto it for a variety of reasons. One
19 reason why I presented that was because in that case
20 the jury had determined that the appropriate measure
21 of damages was a reasonable royalty.

22 So in that case I took a reasonable royalty as a
23 contempt remedy approach, but there was a reason why I
24 added a dollar onto it.

25 Q What was the reason for the dollar addition on top

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1 per unit?

2 A Because there was another price increase that Dish
3 Network or EchoStar had put through. So I took that
4 entire dollar and added that onto the royalty.

5 Q So is it fair to characterize that as a reasonable
6 royalty hybrid disgorgement?

7 A Those are the words that I've used, yes.

8 Q Mr. Dusseault asked you a little bit about the
9 sunset provision and the fact that you included
10 license revenue from the 277 healthcare customers as
11 part of your revenue calculations even if it was
12 during that sunset provision. Do you recall that?

13 A Yes, it was a smaller number of designated health
14 care customers, but yes.

15 MR. STRAPP: I want to hand up to the
16 witness, if I may.

17 Q I just handed up to you, Dr. Ugone, a copy of the
18 Court's injunction order from May 23, 2011. And I
19 would ask you to turn to page 4. That's the last
20 pager of the order?

21 A Yes.

22 Q And that last paragraph there is the sunset
23 provision that we were discussing.

24 Now, if you take a moment to read this sunset
25 provision, I want to ask you whether or not you see

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1 any information in there that permitted Lawson during
2 that sunset provision to license new healthcare
3 customers or add additional users for pre-existing
4 licenses that healthcare customers already had?

5 MR. DUSSEAUT: I object, Your Honor, as to
6 the relevance or usefulness of having an economist
7 interpret your order.

8 MR. STRAPP: Your Honor, I'm only asking
9 about this because Mr. Dusseault went into it on
10 cross.

11 THE COURT: Overruled.

12 MR. DUSSEAUT: I didn't ask him to interpret
13 what it meant and what's what Mr. Strapp is asking.

14 THE COURT: No, I think you asked him what
15 Mr. Strapp told him it meant. Overruled.

16 THE WITNESS: I'm sorry. Are we looking at
17 this last part?

18 THE COURT: What's your question?

19 BY MR. STRAPP:

20 Q My question is whether or not your understanding
21 of the sunset provision was that Lawson was permitted
22 during the sunset provision to continue licensing
23 healthcare customers or whether that license -- excuse
24 me -- whether that sunset provision was just to allow
25 maintenance and service for the healthcare customers?

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1 THE COURT: I thought he said he got his
2 interpretation from you, not from reading the order,
3 or from somebody in your firm.

4 MR. STRAPP: I think the injunction order was
5 listed as one of the materials considered in your
6 reports.

7 THE COURT: I know. That's true. And if he
8 thought about it, but what he said is "I got that
9 information from the lawyers," I believe.

10 MR. STRAPP: Okay.

11 Q Let me just ask you this: Have you reviewed the
12 injunction order before?

13 A Yes.

14 Q Have you reviewed the sunset provision of the
15 injunction order?

16 A Yes.

17 Q Was that one of the materials you considered in
18 forming your opinions?

19 A Yes.

20 Q Could we turn to your supplemental reply expert
21 report, which is in -- I think it's in both binders
22 you have. So you can choose which one. Just turn to
23 the supplemental reply report tab. And I want to
24 direct you specifically to page 15 of that report in
25 the supplemental reply.

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1 A I'm there.

2 Q Do you see that there's a table there, it's called
3 table 2?

4 A Yes.

5 Q Can you explain for the Court, please, what that
6 table 2 is?

7 THE COURT: Wait a minute. I must have the
8 wrong report. What's the date of it? March 20, 2013?

9 MR. STRAPP: That is correct.

10 THE COURT: Page 15?

11 MR. STRAPP: Page 15.

12 THE COURT: All it has is text. Evaluated
13 plaintiff's damages claim. It doesn't have a chart on
14 it at all.

15 MR. STRAPP: You know what, Your Honor? If
16 you turn to the very front of it, you may be in the
17 back in the exhibit section. Perhaps if you look in
18 -- okay. I think --

19 Q Why don't you go to the white binder.

20 THE COURT: I see. There are two page 15s.
21 All right. You have table 2.

22 MR. STRAPP: Yes.

23 THE COURT: All right. I'm with you now.

24 Q Dr. Ugone, can you explain to the Court what table
25 2 is, please?

UGONE - REDIRECT

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1 A Yes. The Court -- well, let me take a step back.
2 In my direct testimony I gave certain daily rates. If
3 you look at table 2 the middle column, it says, With
4 apportionment of large suite revenues, those are the
5 daily rates I presented to the Court during my
6 testimony.

7 On cross-examination, I was asked about daily
8 rates with apportionment of large suite LSF and
9 process flow revenues. And so what this table does is
10 it gives the daily rates for that alternative
11 scenario.

12 THE COURT: With the 85 percent figure as the
13 apportionment?

14 THE WITNESS: Correct.

15 MR. DUSSEAUT: Your Honor, could I just ask
16 that the numbers be read into the record so they are
17 part of our record?

18 THE COURT: What's that?

19 MR. DUSSEAUT: Could I just ask that the
20 numbers be read into the record so they are part of
21 the record?

22 THE COURT: The revenues is 48,821. The
23 gross profits, 30,497. Incremental profits, 24,850.

24 Q If you turn to the page before, page 14,
25 Dr. Ugone, do you see there's a table 1?

UGONE - REDIRECT

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1 A Yes.

2 Q Can you explain to the Court what table 1 depicts?

3 A So in table 1, the middle column, when I gave the
4 revenues, gross profits, and incremental profits as
5 the menu of options for a disgorgement remedy, the
6 middle column are the numbers that we presented to the
7 Court in my direct examination.

8 And cross-examination, I was asked what those
9 numbers would be with apportionment of large suite,
10 LSF, and process flow revenues. So this is what we've
11 been shorthand saying the 85 percent scenario. And
12 that's what those figures represent.

13 MR. STRAPP: Can you put up Configurations 3
14 and 5, please.

15 Q Dr. Ugone, is it your understanding that in light
16 of the injunction, the only module of the infringing
17 configurations that was modification by Lawson was the
18 green module here on your screen, the requisition
19 self-service? Is that your understanding?

20 A Yes.

21 Q So there wouldn't have been any new development or
22 research associated with the other modules; is that
23 your understanding?

24 A That's my understanding.

25 MR. STRAPP: Okay. I have no further

UGONE - REDIRECT

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1 questions.

2 THE COURT: Can he be excused or does he have
3 to come back?

4 MR. STRAPP: He may be excused.

5 MR. DUSSEAUT: He may be excused.

6 THE COURT: You're not going to call him in
7 rebuttal to Dr. --

8 MR. STRAPP: We're not going to hold him here
9 for rebuttal.

10 THE COURT: All right. You're excused,
11 Dr. Ugone.

12 THE WITNESS: Thank you.

13 (The witness was excused from the witness
14 stand.)

15 MR. DUSSEAUT: Your Honor, I'm sorry. I may
16 have missed. Are you guys resting your damages case?

17 MR. STRAPP: Yes. And we are resting our
18 damages case.

19 MR. DUSSEAUT: I was going to make a
20 suggestion for consideration, which is Dr. Putnam, I
21 think, if we do it today, is probably, as I said, in
22 the two to three-hour range. It's 5:00 o'clock.

23 I think if I go back and look at what we got
24 today, I could cut it substantially. I believe that I
25 could. I'd be willing to come and do that on Monday

1 afternoon. And I don't know when you'd want to do the
2 argument, but I think that might make more sense.

3 THE COURT: Well the argument on the
4 injunction, I think, is what we're talking about.

5 MR. DUSSEAULT: Yes, sir.

6 THE COURT: Did you want to be here to handle
7 the injunction argument, Mr. Thomasch?

8 MR. THOMASCH: Obviously, it would be my
9 preference, but even with a redeye back, it would take
10 me until probably midday Tuesday to return. My court
11 is on Monday in Sacramento, California, the Eastern
12 Division of California, before Judge Lawrence Carlton.

13 I'll come back right away, but my preference
14 would be Tuesday afternoon or any time thereafter at
15 the Court's convenience.

16 THE COURT: I can do Tuesday afternoon.

17 MR. THOMASCH: That would be wonderful, Your
18 Honor.

19 THE COURT: You don't have to be here for
20 Dr. Ugone's testimony.

21 MR. THOMASCH: Dr. Putnam. I do not.

22 THE COURT: I mean, Dr. Putnam.

23 MR. THOMASCH: No.

24 THE COURT: We'll do Dr. Putnam in the
25 morning and the injunction argument in the afternoon.

1 MR. THOMASCH: Thank you, Your Honor.

2 THE CLERK: What time are we starting, Your
3 Honor?

4 THE COURT: We'll start at 9:30 on Tuesday
5 the 9th. And then that will be finished by the lunch
6 hour, I'm sure, then we'll pick up at 1:30 or
7 2 o'clock, depending on what the situation is, and
8 then you can be here for the injunction argument.

9 MR. THOMASCH: Thank you, Your Honor.

10 THE COURT: All right. And I'm sure that the
11 United States Government appreciate you not requiring
12 them to incur the added expenses of running things on
13 the weekend. Or you can turn around and blame
14 everything on the U.S. Government. Those who voted
15 Democratic and those who voted Republican all get a
16 share.

17 All right. We'll be in adjournment.

18 (The proceedings were adjourned at 5:02 p.m.)

19 We, Diane J. Daffron and P. E. Peterson,
20 certify that the foregoing is a correct transcript
21 from the record of proceedings in the above-entitled
22 matter.

23 /s/

24 DIANE J. DAFFRON, RPR, CCR DATE
/s/

25 P.E. PETERSON, RPR, CCR DATE